COMMENTS

SINGLE-SEX EDUCATION AFTER *VMI*: EQUAL PROTECTION AND EAST HARLEM'S YOUNG WOMEN'S LEADERSHIP SCHOOL

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INTRODUCTION

At the Virginia Military Institute ("VMI"), brutal hazing by older students and an utter lack of personal privacy greet new students.[1] In contrast, at the Young Women's Leadership School, located in East Harlem, New York, teachers bestow upon their students "'unconditional love'" and students learn in an elite private school atmosphere, replete with classical music in the cafeteria and mid-morning muffins.[2] The commonality that links these schools is a single-sex student body. Last spring, in the name of ensuring equal protection for women, the Supreme Court mandated that the elite all-male VMI abandon its sex-exclusive admission standard and open its doors and its benefits to women seeking its "unique educational opportunities."[3] The fate of the Young Women's Leadership School remains to be seen.

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† A.B. 1995, Colgate University; J.D. Candidate 1998, University of Pennsylvania. I wish to dedicate this Comment to the memory of my father, Gene Corcoran. His love, kindness and humor will forever be missed. I would also like to thank my mother, Carol Ellis, for her zeal for the law, which she instilled in me. Finally, I thank Brian Richards for his companionship and his confidence in me throughout my law school career and particularly during the comment-writing process.

[1] *See* Dianne Avery, *Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. CAL. REV. L. & WOMEN'S STUD. 189, 325, 348 (1996) (comparing the mental and physical abuse inflicted on new VMI cadets as well as the absence of privacy to fraternity hazing).

[2] Tamara Henry, *A New Push for Girls-Only Public Schools*, USA TODAY, Sept. 18, 1996, at 1D, 2D (quoting the principal, Celenia Chevere, on the school's staff approach).

[3] United States v. Virginia (*VMI VI*), 116 S. Ct. 2264, 2269 (1996). Women will attend VMI beginning in the fall of 1997. *See* Bob Twigg, *VMI to Change Little for Women*, USA TODAY, Sept. 23, 1996, at 3A (noting VMI's reaction to the Supreme Court's decision requiring the school to admit women).

As the suit against VMI wound its way through the federal courts,[4] a movement took root among educators, particularly in the nation's inner-city school districts.[5] These educators, desperate for new solutions to the grave problems facing their schools, turned to, among other things, the evil the Justice Department fought to abolish: single-sex education.[6] In Detroit, the school district proposed three schools exclusively for African-American males which were quickly challenged and enjoined.[7] Elsewhere, cities have tried or are trying single-sex classrooms.[8] The Young Women's Leadership School ("YWLS"), an all-girls junior high school that recently opened, represents the latest incarnation of the movement.[9]

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[4] *See* United States v. Virginia (*VMI I*), 766 F. Supp. 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992) (*VMI II*), *cert. denied*, 508 U.S. 946 (1993), *on remand*, 852 F. Supp. 471 (W.D. Va. 1994) (*VMI III*), *aff'd*, 44 F.3d 1229 (4th Cir.) (*VMI IV*), *reh'g denied*, 52 F.3d 90 (4th Cir. 1995) (*VMI V*), *rev'd*, 116 S. Ct. 2264 (1996) (*VMI VI*).

[5] *See* Walteen Grady Truely & Martha F. Davis, *Public Education Programs for African-American Males: A Gender Equity Perspective*, 21 N.Y.U. REV. L. & SOC. CHANGE 725, 728-29 (1994-1995) (noting that the debate has focused on programs for African-American male students); *cf.* Stephanie Gutmann, *Class Conflict*, NEW REPUBLIC, Oct. 7, 1996, at 12, 14 ("[S]ex segregation ... is a culturally conservative remedy increasingly popular with embattled minorities, however objectionable it may be to many white liberals."); Henry, *supra* note 2, at 1D (discussing the upsurge in interest in single-sex education nationally which is exemplified by California Governor Pete Wilson's setting aside funds for 20 such schools and by legislation before Congress to fund pilot programs and to eliminate Title IX sections that bar single-sex classrooms).

[6] *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741, 1742 (1992) [hereinafter *Inner-City Single-Sex Schools*] (noting the efforts of educational reform advocates to establish single-sex schools in poor school districts); *see also* Rene Sanchez, *In East Harlem, a School Without Boys*, WASH. POST, Sept. 22, 1996, at A1 ("[S]chools nationwide ... [are] reconsider[ing] the one-size-fits-all, fully integrated model of public schooling and experiment[ing] with same-sex classes, either for disadvantaged minorities or for girls in subjects such as math or science that traditionally have been dominated by males."); George F. Will, *Secret of School Success*, WASH. POST, Sept. 15, 1996, at C7 (advocating innovative piecemeal programs, like the Young Women's Leadership School, to solve the educational crisis in spite of equal protection issues).

[7] *See* Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2006 & n.8 (1992); *Inner-City Single-Sex Schools*, *supra* note 6, at 1742 (noting a proposal to establish three all-male schools in Detroit in order to help "at risk" boys).

[8] *See* HERBERT GROSSMAN & SUZANNE H. GROSSMAN, GENDER ISSUES IN EDUCATION 147 (1994) (stating that several private organizations and school districts have begun single-sex educational programs).

[9] Recently, all-female schools have enjoyed increased popularity. *See* Pamela Warrick, *A Place Where Girls Can Be All That They Can Be*, L.A. TIMES, Dec. 1, 1996, at E1; *cf.* Liz Willen, *Girls' School Gets Lesson in Controversy: Some Call It Discrimination*, NEWSDAY (Long Island), Nov. 6, 1996, at A68 (noting that YWLS marks the third all-girls public secondary school nationwide). The other two single-sex public schools, Girls High in

This Comment examines the constitutionality of YWLS under the Fourteenth Amendment. Part I of the Comment relays the facts and circumstances surrounding YWLS. An overview of the important case law follows in Part II, which places special emphasis on the two most important cases pertaining to single-sex education: *Mississippi University for Women v. Hogan*[10] and *United States v. Virginia* ("*VMI*").[11] Part III applies the analyses gleaned from *Hogan* and *VMI* to YWLS. First, the applicable level of scrutiny is determined and explained.[12] Second, two purposes that the school district might offer—diversity and improving education—are reviewed and critiqued. These two justifications, when subjected to intermediate scrutiny, do not rise to the level of an "exceedingly persuasive justification."[13] The discussion of the diversity objective reveals that the only type of diversity the Court might accept is akin to a "separate but equal" single-sex school system. Although the Court has neither accepted nor rejected this doctrine in the area of sex classifications,[14] this Comment concludes that even if the Supreme Court were to permit such a system in the sex-classification context, other aspects of the Court's reasoning would constrain the doctrine's effect.

Finally, Part IV analyzes another possible justification that the school district might offer—compensation—which should satisfy the test. Courts have accepted genuinely compensatory purposes so long as the means work directly to achieve the remedial objective.[15] Here, a single-sex school with a heavily math-, science-, and leadership-

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Philadelphia and Western in Baltimore, have survived by maintaining low profiles and technically being open to both girls and boys (though few boys have expressed interest in applying). *See* Mary B.W. Tabor, *Planners of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B1.

[10] 458 U.S. 718 (1982).

[11] 116 S. Ct. 2264 (1996). These cases are most important because they represent the only modern cases decided in this area which provide the benefit of the Supreme Court's actual reasoning.

[12] In sex discrimination cases, courts utilize intermediate level scrutiny which requires that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).

[13] *VMI VI*, 116 S. Ct. at 2274.

[14] *See* Lisa K. Hsiao, *'Separate but Equal' Revisited: The Detroit Male Academies Case*, 1992/1993 ANN. SURV. AM. L. 85, 92 (noting that the "Court has never extended [*Brown*'s] holding to gender-based classifications").

[15] *See, e.g.*, Califano v. Webster, 430 U.S. 313, 318 (1977) (per curiam) (upholding a statutory scheme designed to increase Social Security retirement benefits for women).

centered curriculum is tailored to increase the numbers of women in professions requiring a math and science background and in leadership positions in general. Although compensatory rationales carry the danger of entrenching harmful gender stereotypes, YWLS aims to shatter traditional gender rules, and thus should avoid this pitfall.

I. THE BRIEF HISTORY OF THE YOUNG WOMEN'S LEADERSHIP SCHOOL

In the fall of 1996, the doors of the Young Women's Leadership School ("YWLS"), located in District Four, in East Harlem, New York,[16] opened for fifty-five seventh-grade girls.[17] Next year the school will also house grades eight and nine, and it plans to expand through grade twelve within several years. The idea for the school originated with Ann Rubenstein Tisch,[18] a wealthy woman who wanted to give poor girls an educational opportunity usually reserved for the rich—a single-sex education.[19] Ms. Tisch noted that the best schools in England are single-sex.[20] The school emphasizes math and science,[21] dis-

[16] Previously, New York City had many other single-sex schools, but the civil rights movement led to the end of that era. The last girls school, Washington Irving High School, closed in 1986 due to apprehension that it violated federal anti-segregation laws. *See* Anemona Hartocollis, *A Public School for Girls Only*, DAILY NEWS (N.Y.), July 15, 1996, at 4.

[17] The innovative school limits class size to no more than 18 students. *See* Jacques Steinberg, *Just Girls, and That's Fine with Them*, N.Y. TIMES, Feb. 1, 1997, at 21. Instead of desks, the girls sit around small tables "because research shows that girls prefer to learn by cooperating—not competing—with each other." Sanchez, *supra* note 6, at A1. This type of evidence about supposed sex differences did not get much deference from the Supreme Court in *VMI*. *See VMI VI*, 116 S. Ct. at 2280 (1996) ("[W]e have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia . . . .").

[18] Despite Ms. Tisch's involvement in the school's planning, YWLS is not a private school, but a public school "funded just like any other public school." Henry, *supra* note 2, at 1D.

[19] *See* Anemona Hartocollis, *Groups: Get All-Girls School Off A-Gender*, DAILY NEWS (N.Y.), July 16, 1996, at 14 ("'If single-sex schools are so good for affluent students, wouldn't it follow that they would be good for poor children?'" (quoting Ann Rubenstein Tisch, the philanthropist who helped launch YWLS)). Similar to the private schools that wealthy girls often attend, this school projects a "finishing-school image." Henry, *supra* note 2, at 1D (describing "midmorning muffins; club-like furnishings; classical music in the cafeteria"). The girls also wear uniforms. *See id.*

[20] *See* Hartocollis, *supra* note 19, at 14.

[21] *See* Sanchez, *supra* note 6, at A1 (noting studies which show that teachers in many public schools discourage girls from pursuing interests in math or science); *see also* Hartocollis, *supra* note 16, at 4 ("[I]t is designed to create an environment where high-achieving girls from disadvantaged backgrounds can be encouraged to excel in science and math, and where they can move from poverty to the boardroom and academia.").

ciplines in which girls have historically underperformed.[22] Ms. Tisch and the school district expect the girls to perform better at these disciplines and in general without boys in the classroom.[23] School officials also argue that the school is designed to combat the discrimination to which co-ed schools subject female students.[24]

The school encountered no difficulties in attracting applicants to fill its limited spaces,[25] and in fact, it already has a wait list.[26] The main difficulty the school has faced is opposition by groups such as the New York Civil Liberties Union ("NYCLU"), the New York Civil Rights Coalition, and the New York chapter of the National Organiza-

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[22] *See* NATIONAL CTR. FOR EDUC. STATISTICS, THE EDUCATIONAL PROGRESS OF WOMEN 3-4 (1995) (reporting that inferior science performance by girls first appears around age nine and lasts through age seventeen). *But see* GROSSMAN & GROSSMAN, *supra* note 8, at 29-30 (arguing that studies show that the gap between boys and girls in math has decreased).

[23] *See* ANNMARIE WOLPE, WITHIN SCHOOL WALLS 212 (1988) (reporting that co-ed math and science classes have been cited as a major factor in girls' underachievement in math and science); *see also* Hartocollis, *supra* note 19, at 14 (citing statistics showing that girls do better in science and math when they are apart from boys). At least one teacher at the school has reported a palpable difference in the behavior of her students: "'With the boys around, you have girls that giggle and talk because they are afraid of the boys or trying to get their attention .... I find there is a certain amount of tension not present when you have only girls.'" Willen, *supra* note 9, at A68 (quoting a YWLS teacher, Linda Metnetsky); *cf.* Gutmann, *supra* note 5, at 12 ("[P]articularly at their age group, with puberty, you're really conscious about your body and it's good to be in an environment where you don't feel extra self-conscious because you have boys around." (quoting Winsome McDermott, a mother pushing to get her daughter on YWLS wait list)). *But see id.* ("The idea that girls and boys inevitably distract each other is ... an 'enormously dangerous' presumption ...." (quoting Janet Gallagher, director of the Women's Rights Project of the ACLU)). Several books have been published recently, recounting the problems, including eating disorders and self-esteem problems, that teenage girls experience now more than ever. *See, e.g.*, PEGGY ORENSTEIN, SCHOOLGIRLS at xxviii (1994) ("Girls' diminished sense of self means that, often unconsciously, they take on a second class accommodating status."); MARY PIPHER, REVIVING OPHELIA 11 (1994) (noting common problems of adolescent girls such as anorexia, underachievement, and moodiness).

[24] *See* Sheryl McCarthy, *Let This All-Girls School Be All Girls*, NEWSDAY (Long Island), July 18, 1996, at A44 ("We're fighting against the discrimination [the girls] face in a co-ed environment." (quoting Celenia Chevere, principal of YWLS)).

[25] Most YWLS students come from the surrounding neighborhood. *See* Jacques Steinberg, *Central Board Backs All-Girls School*, N.Y. TIMES, Aug. 22, 1996, at B3. The school requires applicants to submit recommendations and transcripts, undergo preadmission tests, and interview with the school. *See* Gutmann, *supra* note 5, at 12. The school's admission process favors high-achieving students from low income families. *See* Henry, *supra* note 2, at 2D.

[26] *See* Sanchez, *supra* note 6, at A1 ("[A]lready, [YWLS] has scores of girls on its waiting list.").

tion for Women ("NOW").[27] These groups argue that the discriminatory admissions policy violates the Equal Protection Clause as well as a myriad of federal and state laws.[28] They filed a complaint with the New York Office for Civil Rights of the United States Department of Education requesting that the public school begin to recruit and accept boys and perhaps adopt a new gender-neutral name.[29]

School administrators have not acquiesced to these demands. Although the school accepts applications from boys, it has postponed making a decision on whether boys may be students at YWLS in future years.[30] The school district believes, however, that by offering

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[27] *See All-Girls School Can Teach a Lesson*, DAILY NEWS (N.Y.), Aug. 15, 1996, at 48 ("Supposed champions of the rights-deprived underdogs, the[se groups] are using this issue to attempt to deny certain New York children the right to educational opportunity.... They see this school as the greatest threat to liberty since George III."). The school has attracted a lot of attention from groups and people of all political persuasions. *See* John Leo, *Boys on the Side*, U.S. NEWS & WORLD REP., Aug. 5, 1996, at 18 ("[T]here has been a lot of scrambling to determine which side is more politically correct, and there has been a lot of left-right crossover.").

[28] *See, e.g.*, Henry, *supra* note 2, at 1D ("The groups point to violations of the 14th Amendment, the 1964 Civil Rights Act, and Title IX."); McCarthy, *supra* note 24, at A44 (noting that the New York Civil Liberties Union has complained that the school's policy is unconstitutional because it only admits girls). Although YWLS can be challenged on several legal fronts in addition to the Fourteenth Amendment, the statutes implicated are beyond the scope of this Comment, which deals exclusively with the school's constitutionality under the Equal Protection Clause.

[29] *See* Michael Meyers, *Schools Dodge the Law*, USA TODAY, Oct. 15, 1996, at 14A (arguing that YWLS should be "knocked out" like "Detroit's discriminatory all-male public schools"). Recently, the civil rights groups have alleged that the district and school board are deliberately dragging their feet in supplying documents to the Department of Education for its investigation. *See* Rose Kim, *Data Ready in Bias Case*, NEWSDAY (Queens), Feb. 4, 1997, at A22. The NYCLU, the New York chapter of NOW and the New York Civil Rights Coalition will file a court challenge if they can attract a male plaintiff. *See* Gutmann, *supra* note 5, at 12.

In addition to the statutory and constitutional arguments these groups make in opposition to the school, they also make policy arguments. *See, e.g.*, Meyers, *supra*, at 14A ("In an otherwise coed world, sexist schools will teach girls that they can reach for the stars, but only in a universe without boys."); Sanchez, *supra* note 6, at A1 (noting that charges against the school include that it fosters negative stereotypes of each sex and that it misdirects educational reform efforts away from the real problems plaguing schools).

[30] *See, e.g.*, Jacques Steinberg, *All-Girls Public School to Open Despite Objections*, N.Y. TIMES, Aug. 14, 1996, at B1 [hereinafter Steinberg, *All-Girls Public School to Open*] ("[I]f a boy did apply... they are not sure whether they would accept him, considering that the interview process is geared toward finding girls interested in learning to be leaders."); Jacques Steinberg, *Central Board Backs All-Girls School*, N.Y. TIMES, Aug. 22, 1996, at B3 [hereinafter Steinberg, *Central Board Backs School*] (noting that the school district and board of education have "reserved" a decision on whether to admit boys in the future).

comparable mathematics, science and leadership curricula at other district schools, the school will be able to withstand constitutional scrutiny.[31] Most recently, District Four has announced that it is exploring the idea of creating an all-boys school comparable to YWLS, inspired at least in part to ward off litigation aimed at YWLS.[32]

II. CASE LAW PERTAINING TO SINGLE-SEX SCHOOLS

This Part touches upon some of the early cases regarding single-sex education, decided under the rational basis test.[33] In *Craig v. Boren*, the Supreme Court formulated the intermediate scrutiny standard[34] after it explicitly rejected rational basis review in *Frontiero v. Richardson*.[35] Cases decided under the intermediate scrutiny test,[36] in-

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[31] *See* Steinberg, *Central Board Backs School*, *supra* note 30, at B3.

[32] *See* Lawrence Goodman & Anne E. Kornblut, *New School Agender: Boys' HS*, DAILY NEWS (N.Y.), Dec. 11, 1996, at 2 (stating that an all-boys school may appease current challengers of YWLS).

[33] The rational basis test requires that the state's discriminatory classification have "a basis in reason." Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (upholding law which denied bartending licenses to women unless they were the wives or daughters of male bar owners). For other cases regarding single-sex education decided before *Craig v. Boren*, 429 U.S. 190 (1976), see Kirstein v. Rector, 309 F. Supp. 184 (E.D. Va. 1970) (ordering that Virginia admit women to the University of Virginia); Allred v. Heaton, 336 S.W.2d 251 (Tex. Civ. App. 1960) (refusing a woman entrance to the Texas A & M University even though she desired to major in a subject matter that was only offered at that school); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958) (denying women entrance to the Texas A & M University because of the availability of comparable schools).

[34] *See* 429 U.S. 190 (1976). In *Craig*, an Oklahoma statute prohibiting the sale of 3.2% beer to males under 21 but only prohibiting the sale of this type of beverage to females under 18 was challenged as a denial of equal protection to males aged 18-20. *See id.* at 191-92 (stating the issue of the case as "whether such a gender-based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the Fourteenth Amendment"). The Supreme Court found that the statistics proffered by the state to justify the law were "too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to [the goal of Oklahoma's statutory scheme]" and held that the law therefore denied men between the ages 18-20 equal protection. *Id.* at 204.

[35] 411 U.S. 677 (1973). A plurality in *Frontiero* actually applied strict scrutiny. *See id.* at 688 (arguing the unconstitutionality of a statute which provided female members of the uniformed services with allowances for dependents, but under certain restrictions, when male members were not similarly restricted).

[36] In order to pass intermediate scrutiny, "'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Califano v. Webster, 430 U.S. 313, 316-17 (1977) (quoting *Craig*, 429 U.S. at 197); *see infra* Part IV.A.

cluding *Hogan*[37] and *VMI*,[38] are looked at in greater depth.

A. *Pre-*Craig *Case Law*

1. *Williams v. McNair*

In *Williams v. McNair*,[39] decided in 1971, the Supreme Court affirmed by memorandum a South Carolina district court's refusal to order admission of men to the all-women Winthrop College. The district court noted that the State maintained a wide array of school offerings and that, with the exception of Winthrop and the Citadel, South Carolina's other public universities admitted both sexes.[40] The court explained that historically, the legislature adjudged the Citadel, a military school, more appropriate for men,[41] and Winthrop, which offered courses in "needlework, cooking, housekeeping and such other industrial arts" more appropriate for women.[42] Applying rational basis review,[43] the court found the discrimination not "wholly wanting in reason" because of the long tradition and history of single-sex education, even though the methodology was not in favor at the moment.[44] The court distinguished *Kirstein v. Rector and Visitors of the University of Virginia*,[45] in which a court mandated the admission of women to the University of Virginia, on the basis that in *Kirstein*, the female plaintiff had been denied admission to Virginia's finest state school, whereas Winthrop College did not occupy such a position.[46]

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[37] 458 U.S. 718 (1982).

[38] 116 S. Ct. 2264 (1996).

[39] 401 U.S. 951 (1971) (mem.), *aff'g* 316 F. Supp. 134 (D.S.C. 1970).

[40] *See Williams*, 316 F. Supp. at 135-36.

[41] The Citadel was ordered to admit women in 1995. *See* Faulkner v. Jones, 51 F.3d 440, 450 (4th Cir. 1995) (holding that the Citadel's offering single-sex education to males without justification violates the Equal Protection Clause).

[42] *Williams*, 316 F. Supp. at 136 n.3; *cf.* MARIA MOBILIA BOUMIL ET AL., LAW AND GENDER BIAS 171-72 (1994) ("By the beginning of the twentieth century, a significant number of women were able to acquire some form of higher education. The form this 'higher education' took, however, was still based upon what was considered suitable and helpful for young women to learn, and the curricula of many women's schools were limited accordingly.").

[43] *See Williams*, 316 F. Supp. at 136-37 ("It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (footnote omitted)).

[44] *See id.* at 137.

[45] 309 F. Supp. 184 (E.D. Va. 1970).

[46] *See Williams*, 316 F. Supp at 138-39 ("It is not intimated that Winthrop offers a wider range of subject matter or enjoys a position of outstanding prestige over the

Citing *Heaton v. Bristol*,[47] the court rejected the argument that the school's convenient location to some or all of the plaintiffs' homes constitutionally demanded their admittance to the school.[48] The court also rebuffed the plaintiffs' argument that Winthrop's allowance of men in its summer and evening classes weakened the State's legislative judgment that an all-women state school has merit.[49] Refusing to question such legislative determinations, the court stated, "flexibility and diversity in educational methods, when not tainted with racial overtones, often are both desirable and beneficial; they should be encouraged, not condemned."[50]

2. *Vorchheimer v. School District*

Later that decade, in *Vorchheimer v. School District*,[51] an evenly divided Supreme Court affirmed in a memorandum opinion the Third Circuit's refusal to admit women to Philadelphia's prestigious all-boys Central High School. The plaintiff, Susan Vorchheimer, an academically gifted student, had visited several Philadelphia high schools, including Girls High, the all-girls counterpart to Central, and preferred the atmosphere and academic excellence of Central.[52] The trial court, however, found Girls High "academically and functionally equivalent" to Central.[53] Based on this finding, the Third Circuit characterized Vorchheimer's reason for wanting to attend Central as "based on personal preference rather than being founded on an objective evaluation" of the school's offerings.[54] The Third Circuit's reasoning, however, was flawed by its own admission that Central's science facilities were superior to those of Girls High.[55]

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other State-supported institutions in this state whose admission policies are coeducational.").

[47] 317 S.W.2d 86, 99 (Tex. Civ. App. 1958).

[48] *See Williams*, 316 F. Supp. at 138 (recognizing that the location of any institution necessarily benefits some and is a detriment to others, which does not justify preferential treatment for those who wish to attend an educational institution in their home town).

[49] *See id.* (concluding that it is for the legislature, not the courts, to decide whether Winthrop's merit as an all-women institution was weakened).

[50] *Id.*

[51] 430 U.S. 703 (1977), *aff'g* 532 F.2d 880 (3d Cir. 1976).

[52] *See Vorchheimer*, 532 F.2d at 882.

[53] *Id.* (citing Vorchheimer v. School Dist., 400 F. Supp. 326, 329 (E.D. Pa. 1975)). Despite this finding, the district court, using heightened scrutiny, ordered an injunction to force the school to admit girls. *See Vorchheimer*, 400 F. Supp. at 343.

[54] *Vorchheimer*, 532 F.2d at 882.

[55] *See id.* ("The academic facilities are comparable, with the exception of those in

Although the Supreme Court employed noticeably heightened rational basis review in *Reed v. Reed*,[56] the Court in *Vorchheimer* distinguished *Reed* and found *Williams*[57] controlling.[58] In distinguishing *Reed* and other recent sex discrimination cases in which the Supreme Court had struck down discriminatory statutes,[59] the *Vorchheimer* Court stated that unlike in the instant case, "[n]one of the cases was concerned with a situation in which equal opportunity was extended to each sex or in which the restriction applied to both."[60] The Court also denied that *Sweatt v. Painter*[61] and *Brown v. Board of Education*[62] applied because sex, unlike race, is not a suspect classification.[63]

Judge Gibbons, in his dissent, compared the majority's opinion to *Plessy v. Ferguson*,[64] arguing that it "reminds us that the [separate but equal] doctrine can and will be invoked to support sexual discrimination in the same manner that it supported racial discrimination prior to *Brown*."[65] He also remarked that Vorchheimer should not have to submit to segregation to receive the best schooling Philadelphia of-

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the scientific field where Central's are superior.").

[56] 404 U.S. 71, 76 (1971) (requiring a "'fair and substantial relation'" between the ends and the means (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).

[57] 316 F. Supp. at 134.

[58] *See Vorchheimer*, 532 F.2d at 887 ("We may not cavalierly disregard *Williams* although it predated *Reed* by a few months. Indeed, the two cases are not inconsistent because the state schools' restrictive admissions policy applied to both sexes, a significant difference from the preferential statutory procedure in *Reed*. This distinction is enough to justify the use of the rational relationship test in *Williams* . . . ." (footnote omitted)).

[59] *See, e.g.*, Stanton v. Stanton, 421 U.S. 7, 14 (1975) (rejecting a state statute that, in the context of parental support obligations, specified a greater age of majority for males than for females); Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975) (rejecting a policy that paid Social Security benefits to the minor children of both male and female wage-earners, but only to the surviving spouse of male, not female, wage-earners); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (rejecting an Air Force policy that provided allowances for dependent spouses of servicemen without restriction, but for dependent spouses of servicewomen only if it could be proved that the spouses were actually dependent).

[60] *Vorchheimer*, 532 F.2d at 886.

[61] 339 U.S. 629 (1950).

[62] 347 U.S. 483 (1954).

[63] *See Vorchheimer*, 532 F.2d at 886 ("We are committed to the concept that there is no fundamental difference between races and therefore, in justice, there can be no dissimilar treatment. But there are differences between the sexes which may, in limited circumstances, justify disparity in law.").

[64] 163 U.S. 537 (1896).

[65] *Vorchheimer*, 532 F.2d at 889 (Gibbons, J., dissenting).

fered to girls.[66] Seven years later, a state court, applying intermediate scrutiny, ordered Central to admit girls.[67]

B. *Post-*Craig *Case Law*

1. *Mississippi University for Women v. Hogan*

The main precedent relied on by the Supreme Court in *VMI* was *Mississippi University for Women v. Hogan.*[68] In *Hogan,* Joe Hogan, a registered nurse in the city where the Mississippi University for Women School of Nursing ("MUW") was located, sought admission to the school to obtain his baccalaureate degree in nursing. Although school officials allowed him and other men to audit the school's classes, Hogan, an otherwise qualified candidate, could not take classes for credit at the school "solely because of his sex."[69] The Supreme Court declared that the discriminatory policy at MUW's nursing school violated the Equal Protection Clause.[70] Although the State proffered a benign purpose for the classification, and the burden on the plaintiff could be termed nothing more than the denial of the convenience of attending a nursing school in his home town, the Court applied an intermediate level of scrutiny.[71] The State argued that an all-women nursing school served a compensatory purpose—a remedy for past discrimination against women.[72] The Court rejected that such compensation actually motivated the State, both because no affirmative action was needed in the nursing profession, where women vastly outnumbered men, and because the State made no

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[66] *See id.* (Gibbons, J., dissenting) ("The train Vorchheimer wants to ride is that of a rigorous academic program among her intellectual peers.... Her choice, like Plessy's, is to submit to that segregation or refrain from availing herself of the service.").

[67] *See* Newberg v. Board of Pub. Educ., 9 Phila. County Rep. 556, 577 (C.P. Phila. County 1983) ("Said defendants ... are enjoined from barring admission of students to Central High School based solely upon gender.").

[68] 458 U.S. 718 (1982). Interestingly, some of the salient facts of this case, including the plaintiff's desire to attend a conveniently located school and the fact that the university at issue had an imperfect single-sex policy, recall *Williams.* The *Hogan* court's reliance on these factors differed considerably from that of the *Williams* court.

[69] *Id.* at 720-21.

[70] *See id.* at 733.

[71] *See id.* at 724 n.9 ("[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court.").

[72] *See id.* at 727.

showing that such a purpose motivated the legislature.[73] Also, the Court reasoned that single-sex education could not substantially relate to any important state purpose because the University allowed men to audit the classes.[74] Thus, Mississippi's proposed interests and the tie between the State's interests and its means "fall[] far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification."[75]

In one of three separate dissents in the case, Justice Powell argued that the school served the important state purpose of having a diverse school system, one including all-women's schools that have been the preference of "more than 40,000 young women . . . over the years."[76] He denigrated the use of an intermediate level of scrutiny because the plaintiff's burden was only an inconvenience that was "somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town."[77] Justice Blackmun's dissent also bemoaned the use of the Equal Protection Clause to destroy long-cherished societal fixtures such as single-sex schooling.[78]

Chief Justice Burger's dissent emphasized that the Court's holding was limited to a professional nursing school.[79] He believed that the Court's emphasis on the fact that no affirmative action was necessary in the nursing profession "suggests that a State might well be justified in maintaining, for example, the option of an all-women's busi-

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[73] *See id.* at 729-30 ("Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities.").

[74] *See id.* at 730 ("MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.").

[75] *Id.* at 731.

[76] *Id.* at 735 (Powell, J., dissenting) ("Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life.").

[77] *Id.* at 736 (Powell, J., dissenting).

[78] *See id.* at 734 (Blackmun, J., dissenting) ("[I]t is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice.").

[79] *See id.* at 733 (Burger, C.J., dissenting); *see also id.* at 723 n.7 ("[W]e decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.").

ness school or liberal arts program."[80]

2. *Garrett v. Board of Education*

Between the *Hogan* and *VMI* decisions, a district court in Detroit in *Garrett v. Board of Education*[81] enjoined the opening of three proposed all-male schools ("Academies").[82] Plaintiffs, parents and their female children attending public school in Detroit, objected to the Detroit Board of Education's decision to restrict the enrollment of the Academies to boys. The Board decided to create the schools in response to the crisis facing the city's African-American males,[83] and the Academies' programs were designed to alleviate the major problems this group faced.[84] Plaintiffs argued that the programs did not require the absence of girls to succeed and that the programs, in fact, contained information relevant to boys and girls alike.[85] The plaintiffs also argued that despite the Board's volunteered aim to address problems like excessive unemployment, school dropout rates, and violence plaguing urban males, enrollment at the Academies was not limited to boys likely to suffer such problems, but rather, the admissions policy required that high, mid-level and low-need boy students attend the school in equal numbers.[86] Moreover, plaintiffs asserted, restricting admission to boys "ignor[es] the plight of urban females [which] institutionalizes inequality and perpetuates the myth that

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[80] *Id.* at 733 (Burger, C.J., dissenting).

[81] 775 F. Supp. 1004 (E.D. Mich. 1991).

[82] *See id.* at 1006 (observing that the Academies planned to serve around 250 boys from preschool to fifth grade, with sixth grade through eighth grades added in the near future).

[83] *See id.* at 1007 (acknowledging that African-American males faced high homicide, unemployment and school drop-out rates); *see also* Daniel E. Gardenswartz, Comment, *Public Education: An Inner-City Crisis! Single-Sex Schools: An Inner-City Answer?*, 42 EMORY L.J. 591, 609-11 (1993) (stating that, at the time of the Board of Education action, in Wayne County, Michigan, "the number of young, minority men in the criminal justice system was greater than all minority men of all ages then enrolled in college").

[84] *See Garrett*, 775 F. Supp. at 1006 (noting that the Academies' offerings include "a class entitled 'Rites of Passage,' an Afrocentric (Pluralistic) curriculum, futuristic lessons in preparation for 21st century careers, an emphasis on male responsibility, mentors, Saturday classes, individualized counseling, extended classroom hours, and student uniforms").

[85] *See id.*

[86] *See id.* at 1006 n.3 (explaining that the admissions process required the separation of applicants into categories of high, mid-level and low need, and one-third of admitted students were randomly selected from each).

females are doing well in the current system."[87]

Like Mississippi in *Hogan*, Detroit argued that the Academies served a compensatory purpose.[88] Detroit distinguished itself from Mississippi by arguing that the group benefiting from its classification, urban males, performs substantially worse than urban females in Detroit's co-ed learning environments.[89] Although the court accepted that the current educational system failed its male students, the court noted that Detroit made no showing that the presence of girls in its schools caused the failure.[90] The court was disturbed by the prospect that if the male Academies succeeded, "success would be equated with the absence of girls rather than any of the educational factors that more probably caused the outcome."[91] Thus, even though Detroit had an "important" purpose in wanting to remedy the problems facing urban males, the city still had to provide evidence that the exclusion of females was necessary to fight these problems. The court noted that this need would be difficult to show, given that "the educational system is also failing females."[92] In sum, the important governmental interest alone "is insufficient to override the rights of females to equal opportunities."[93]

3. *United States v. Virginia*

The last and most important precedent discussed here is *United States v. Virginia*, (VMI).[94] In *VMI*, the Court, in an opinion written by

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[87] *Id.* at 1007; *see also* Truely & Davis, *supra* note 5 (challenging the idea that only African-American boys are at-risk and discussing some of the problems and needs of African-American girls).

[88] *See Garrett*, 775 F. Supp. at 1007 (noting that in *Hogan*, Mississippi justified its policy on grounds that it compensated women for historical discrimination, just as the Academies served to compensate urban males for the failure of coeducational programs).

[89] *See id.* ("[D]efendant here argues it has confirmed that the present delivery of education has resulted in substantially lower achievement levels for males than for females . . . ."). *But cf.* Hsiao, *supra* note 14, at 109 (noting that "the perception that African American females are far outperforming African American males educationally and socially not only ignores the equally pressing problems faced by females, but also may prove stigmatizing and demoralizing for males, who are already disproportionately represented in programs addressing special education and disciplinary problems").

[90] *See Garrett*, 775 F. Supp. at 1007 ("Although co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure.").

[91] *Id.*

[92] *Id.* at 1008.

[93] *Id.* at 1014.

[94] 116 S. Ct. 2264 (1996).

Justice Ginsburg,[95] mandated that the all-male Virginia Military Institute (VMI) admit women as cadets. The VMI is a prestigious, state-run institution of higher learning that has a long tradition of producing leaders and others in esteemed societal positions.[96] The school uses a unique form of training designed to produce "citizen-soldiers."[97] No comparable educational opportunity existed for women in the Commonwealth of Virginia.[98]

In 1990, on behalf of an anonymous woman who desired to attend VMI, the Justice Department brought suit against Virginia and VMI.[99] Initially, the district court ruled that the school passed legal muster, despite finding that some women desired entrance to VMI[100] and that some women would be able to perform all that the school required of its cadets.[101] The court also found, however, that if women were allowed access to this unique opportunity, some of the school's unique qualities would have to be altered.[102] In sum, because the adversative environment could not survive unaltered, the court found "sufficient constitutional justification" for maintaining VMI as an all-male institution.[103] The district court reasoned tautologically

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[95] For a fascinating discussion of Ruth Bader Ginsburg's pivotal role as a practicing lawyer in gender jurisprudence, see Collin O'Connor Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 524-28 (1996).

[96] *See VMI VI*, 116 S. Ct. at 2269 (noting that graduates of VMI have gone on to become "military generals, Members of Congress, and business executives").

[97] *See id.* ("VMI uses an 'adversative method' modeled on English public schools and once characteristic of military instruction.").

[98] *See id.* (observing that VMI is the sole educational institution in Virginia that utilizes the adversative method). The Court noted, however, that the course offerings available at VMI were available elsewhere in Virginia. *See id.* at 2270 (explaining the difference between VMI and other state universities is that "VMI's mission is special").

[99] *See id.* at 2271 (stating that the United States sued Virginia and VMI on the grounds that VMI's exclusive male admission policy violated the Equal Protection Clause).

[100] "Between 1988 and 1990, VMI received inquiries, test scores, or other requests for information from 347 women.... VMI did not respond to them ...." *See VMI I*, 766 F. Supp. 1407, 1436 (W.D. Va. 1991).

[101] *See VMI I*, 766 F. Supp. at 1412. *But see* Faulkner v. Jones, 858 F. Supp. 552, 569 (D.S.C. 1994) (holding that the Citadel's discriminatory admissions policy violates the Equal Protection Clause and ordering the admission of plaintiff Shannon Faulkner). For an in-depth analysis of the Faulkner litigation, see Sara L. Mandelbaum, *A Judicial Blow for "Jane Crowism" at The Citadel in* Faulkner v. Jones, 15 N. ILL. U. L. REV. 3 (1994).

[102] *See VMI I*, 766 F. Supp. at 1412-13 (describing the inevitable changes to the adversative environment, such as the loss of all-male status, allowances for personal privacy, and the alteration of physical education requirements).

[103] *Id.*

from the premises that VMI's uniqueness added to the diversity of Virginia's educational system and that single-sex education benefited both sexes to conclude that the only way to accomplish the important governmental objective of single-sex education "is to exclude women from the all-male institution—VMI."[104]

The Fourth Circuit Court of Appeals, however, reversed the district court's judgment, concluding that "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."[105] The court remanded the case in order to find a remedy for the State's constitutional violation.[106] The court delineated three possible options from which Virginia could choose: VMI could admit women, set up a parallel program or institution, or become a private institution (thereby abandoning state funding).[107]

From these options, the State chose to establish a parallel program for women which it called Virginia Women's Institute for Leadership (VWIL).[108] In designing the school, the State's Task Force aimed to fulfill the same mission that VMI strove toward (producing citizen-soldiers) in a manner suitable for "most women."[109] As a result, the Task Force decided to eschew the military model, which it found "wholly inappropriate" for VWIL, and institute a "cooperative method which reinforces self-esteem."[110] Despite the remarkable differences in the financial resources, quality of professors, theories of education, prestige levels, and course offerings,[111] both the district court and the court of appeals found that VWIL adequately resolved any equal protection issues raised by the State's maintenance of the all-male VMI.[112] The court of appeals, in scrutinizing the classifica-

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[104] *Id.* at 1415.

[105] *VMI II*, 976 F.2d 890, 899 (4th Cir. 1992).

[106] *See id.* at 900 ("[W]e ... remand the case ... to require the defendants to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause ....").

[107] *See id.*, 976 F.2d at 900.

[108] *See VMI III*, 852 F. Supp. 471, 476-477 (W.D. Va. 1994) (examining whether VWIL, as a remedial plan, comports with the Equal Protection Clause).

[109] *Id.* at 476.

[110] *Id.*

[111] *See id.* at 477 (describing the differences between VMI and VWIL).

[112] *See VMI VI*, 116 S. Ct. at 2272-73 (describing the district court's conclusion, as well as the circuit court's affirmation of the conclusion, that VWIL met the equal protection requirements despite differences between VMI and VWIL, because the state was not required to provide a mirror-image VMI for women). *But cf.* Sweatt v. Painter, 339 U.S. 629 (1950) (holding that an African-American rejected by the University of

tion, appeared to use a more deferential level of scrutiny than gender discrimination jurisprudence requires.[113] The court then supplemented intermediate scrutiny by gauging the "substantive comparability" of VMI and VWIL. It held that although a VWIL degree "lacks the historical benefit and prestige" of a VMI degree, the educational opportunities offered by the two schools were "sufficiently comparable."[114]

The Supreme Court, however, disagreed with the lower courts and held that "the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities that VMI affords."[115] As did the lower courts, the Supreme Court relied on *Hogan* as "the closest guide."[116] The Court perceived two issues. The manner in which it phrased the first issue

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Texas Law School solely because of his race, and instead, offered admission to a segregated law school which is not substantially equal to the University of Texas in its educational opportunities, must be admitted to the University of Texas Law School).

[113] *See VMI IV*, 44 F.3d 1229, 1236 (4th Cir. 1995) (noting that the court would determine the legitimacy of Virginia's purpose "deferentially"); *see also* Mandelbaum, *supra* note 101, at 9-12 (charging the Fourth Circuit "affirmed the lowering of the applicable standard to unprecedented depths, inventing out of whole cloth a 'special' intermediate scrutiny test").

[114] *VMI IV*, 44 F.3d at 1241. The dissent vigorously argued that the Constitution required more than the majority's version of "substantive comparability." Judge Phillips argued that the only way the state could have survived the rigors of the Equal Protection Clause would have been to "simultaneously open[] single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources." *VMI IV*, 44 F.3d at 1250 (Phillips, J., dissenting).

When the Fourth Circuit denied rehearing of the case en banc, Judge Motz's dissenting opinion expressed agreement with Judge Phillips's earlier dissent and added:

> [H]ow can a degree from a yet to be implemented supplemental program at Mary Baldwin be held "substantively comparable" to a degree from a venerable Virginia military institution that was established more than 150 years ago? . . . Women need not be guaranteed equal "results," . . . but the Equal Protection Clause does require equal opportunity . . . [and] that opportunity is being denied here.

VMI V, 52 F.3d 90, 92-93 (4th Cir. 1995) (Motz, J., dissenting) (denying petition for reh'g en banc).

[115] *VMI VI*, 116 S. Ct. at 2269.

[116] *Id.* at 2271. In *Virginia*, the Supreme Court described *Hogan* as holding that a party seeking to uphold government action based on sex must establish an "exceedingly persuasive justification" for the classification. To succeed, the defender of the challenged action must show "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* (citation omitted) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

suggested the answer: "[D]oes Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny to women 'capable of all of the individual activities required of VMI cadets,' the equal protection of the laws guaranteed by the Fourteenth Amendment?"[117] The second issue involved the appropriate remedy if "VMI's 'unique' situation—as Virginia's sole single-sex public institution of higher education" violated the Equal Protection Clause.[118] The Court began its analysis with a rationalization of the "skeptical scrutiny" utilized to combat sex discrimination, noting that it "responds to volumes of history."[119]

Virginia offered two justifications for the classification, neither of which the Court found persuasive. First, Virginia argued that its purpose in maintaining an all-male VMI was to further "diversity in educational approaches."[120] The Court, refusing to accept such a benign justification without further inquiry, examined the claimed purpose and concluded that the interest in educational diversity was not Virginia's actual purpose in maintaining VMI.[121] Moreover, the Court refused to believe that VMI truly furthered a variety of educational options because the school only accrued benefit to males.[122] "However

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[117] *See id.* at 2274 (quoting *Virginia*, 766 F. Supp. at 1412 (citation omitted)).

[118] *Id.* (citation omitted).

[119] *Id.* at 2274-75. The Court reviewed women's delayed achievement of suffrage; the former rational basis standard previously used by the Supreme Court to deny women equal opportunity; and the more recent recognition by the Court that "neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.*

[120] *See id.* at 2276 (quoting Brief for Cross-Petitioners at 25).

[121] *See id.* at 2277 ("Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options."). Although the Court acknowledged that a wide variety of public schools could "serve the public good," the Court also emphasized that this instance did not present the question of the state "evenhandedly . . . support[ing] diverse educational opportunities," but rather a case where a "unique" educational opportunity is reserved for one sex. *See id.* at 2276 n.7, 2277. One critic argues that in prior cases, it seemed that the purported inquiry into the legitimacy of the state's motive was an "empty construct"—statutes had previously only fallen by it when the classification also failed to substantially advance the state's goal. *See The Supreme Court, 1995 Term-Leading Cases*, 110 HARV. L. REV. 135, 183 (1996) [hereinafter *Leading Cases*]. In *VMI*, the critic argues, the Court acknowledged that the "discriminatory policy directly promoted effective college education," but still performed the actual-purpose inquiry. *Id.* The critic argues that this analysis "threatens to transform the Supreme Court into a 'council of revision.'" *Id.*

[122] *See VMI VI*, 116 S. Ct. at 2279 (stating that VMI's plan to provide educational benefit to males would require accommodations that would prove fatal to the pro-

'liberally' this plan serves the State's sons, it makes no provision whatever for her daughters. That is not *equal* protection."[123]

Virginia also argued that the beneficial adversative method employed by VMI would suffer major alterations if women were admitted to the school.[124] This, the State contended, would harm both men and women. Men would suffer because no longer would they be able to obtain the unique training. Women would suffer because their participation would cause the program to lose its distinctive character.[125] Although the Supreme Court acknowledged that VMI would have to make some accommodations for women,[126] the Court emphasized repeatedly that "[n]either the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women."[127] Furthermore, while acknowledging the existence of some "inherent differences" between the sexes, the Court emphasized that these characteristics "remain cause for celebration," not denigration, and not as a basis to deny opportunities.[128]

Moreover, the Court rejected the "findings" that the district court made regarding "gender-based developmental differences" which were based on "opinions about typically male or typically female 'tendencies.'"[129] In doing so, the Court reiterated an important lesson

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gram).

[123] *Id.*

[124] *See id.* Professor Mary M. Cheh responds to the argument as follows:

> To say that if women were admitted, their admission would change the experience is like saying that, if I moved, I would have a new address .... Yes, there would be a change, but the question is whether the change would be relevant and, if so, to what? If the aim is to produce citizen soldiers, to build character and esprit de corps, the relevant finding would have to be that can only be done effectively by the VMI adversative methodology in a single-gender context .... The very existence of the coeducational military academies refutes this argument.

Mary M. Cheh, *An Essay on VMI and Military Service: Yes, We Do Have to Be Equal Together*, 50 WASH. & LEE L. REV. 49, 53-54 (1993).

[125] *See VMI VI*, 116 S. Ct. at 2279 (stating Virginia's reasoning that the admittance of women into VMI would harm men and women). *But see* Bob Twigg, *VMI to Change Little for Women*, USA TODAY, Sept. 23, 1996, at 3A (reporting that the only modifications VMI will make are curtains and separate showers and that women will have to get buzz cuts). The Court recognized this argument to be the same "self-fulfilling prophes[y]" used to impede women's progress to opportunities like a military, law or police career. *VMI VI*, 116 S. Ct. at 2280-81.

[126] *See VMI VI*, 116 S. Ct. at 2279 (noting that the main accommodations would include changes in housing and physical training programs for women).

[127] *Id.* at 2269.

[128] *Id.* at 2276.

[129] *Id.* at 2279 (quoting *VMI I*, 766 F. Supp. 1407, 1434-35 (W.D. Va. 1991)

from previous gender-discrimination cases: "State actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[130] Because the State's proffered generalizations about the desires and abilities of each sex were not uniformly correct, the State could not deny to women an opportunity available to men, because some women will fall outside the mold. The Court determined that VMI's real mission is "to produce 'citizen-soldiers,'" and "that goal is great enough to accommodate women."[131] In the parlance of intermediate scrutiny, the Court held that maintaining VMI as an all-male school did not substantially relate to the interests of producing citizen-soldiers or the preservation of the adversative method.[132]

In the second part of the opinion, the Court dismissed VWIL as an inadequate remedy because it did not respond closely enough to the constitutional violation.[133] The Court chastised Virginia for creating for women a "program fairly appraised as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence."[134] The Court concluded

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(observing that one of the "tendencies" accepted by the district court was that "'[m]ales tend to need an atmosphere of adversativeness' while '[f]emales tend to thrive in a cooperative atmosphere'") (alteration in original) (quoting *VMI I*, 766 F. Supp. at 1434-35)).

[130] *Id.* at 2280 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725(1982)) (noting also that courts should take a "hard look" at purported "tendencies").

[131] *Id.* at 2281-82 (quoting *VMI I*, 766 F. Supp. at 1425).

[132] One might also question the importance of the state's interest in maintaining the adversative method. Justice Rehnquist's concurrence clearly stated that this objective does not rank as important. *See id.* at 2290 (Rehnquist, C.J., concurring) ("[M]aintenance of the adversative method . . . does not serve an important governmental objective."). Professor Finley, writing about the VMI litigation in the lower courts, described how the adversative method and other characteristics of VMI escaped scrutiny. *See* Lucinda M. Finley, *Sex-Blind, Separate but Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1110-13 (1996) ("The norm at issue—VMI itself, its structures, methods, values, and social significance as a means for maintaining notions of masculinity and masculine privilege—escaped serious scrutiny. The correctness or naturalness of the male standard of VMI was assumed . . . .").

[133] *See VMI VI*, 116 S. Ct. at 2282 (observing that previous cases have required that remedial measures "must be shaped to place persons unconstitutionally denied an opportunity . . . in 'the position they would have occupied in the absence of [discrimination]'" (alteration in original) (quoting Milliken v Bradley, 433 U.S. 267, 280 (1977))).

[134] *Id.* at 2285 (quoting *VMI IV*, 44 F.3d 1229, 1250 (1995) (Phillips, J., dissenting)). The Court analogized VWIL to the law school that Texas set up for African Americans in *Sweatt v. Painter*, 339 U.S. 629 (1950): "In line with *Sweatt*, we rule here

that "[w]omen seeking and fit for a VMI-quality education cannot be offered anything less, under the State's obligation to afford them genuinely equal protection."[135]

Rehnquist's concurrence focused mainly on the Court's repeated invocation of the phrase "exceedingly persuasive justification," which he believed obfuscated the intermediate level of scrutiny.[136] He also avowed that he did not believe the Equal Protection Clause prohibited separate but equal single-sex schools, "if the two institutions offered the same quality of education and were of the same overall caliber."[137]

The sole dissenter, Justice Scalia, accused the majority of secretly supplanting intermediate level scrutiny with strict scrutiny, evinced by its repeated use of the "exceedingly persuasive justification" phrase.[138] He argued that the majority's emphasis on "some women" contradicted previous gender discrimination jurisprudence which required only that the classification "substantially relate" to the state interest and not necessarily by the least restrictive means.[139] Justice Scalia believed that Virginia easily passed the intermediate scrutiny test.[140]

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that Virginia has not shown substantial equality in the separate educational opportunities the state supports at VWIL and VMI." *Id.* at 2286.

[135] *Id.* at 2287.

[136] *See id.* at 2288 (Rehnquist, C.J., concurring) ("While terms like 'important governmental objective' and 'substantially related' are hardly models of precision, they have more content and specificity than does the phrase 'exceedingly persuasive justification.'"). Justice Rehnquist opined that the phrase "exceedingly persuasive justification" should only be used "as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself." *Id.*

[137] *Id.* at 2291 (Rehnquist, C.J., concurring) (concluding that "VWIL simply is not, in any sense, the institution that VMI is").

[138] *See id.* at 2294 (Scalia, J., dissenting) (discussing how the United States asked the Court to apply strict scrutiny to gender classifications and that "[t]he Court, while making no reference to the government's argument, effectively accepts it").

[139] *See id.* at 2294-95 (Scalia, J., dissenting) ("The reasoning in our other intermediate-scrutiny cases has [not] required . . . a perfect fit."). *But see* Udell, *supra* note 95, at 553 (arguing that Justice Scalia's contention "that the majority conducted a 'least-restrictive-means analysis' in an effort to accomodate only [a few women] seeking entry to VMI overlooked (1) the fact that over 300 women sought to apply to VMI in the two years prior to the lawsuit, and (2) sex-based differences in the average do not justify discrimination" (footnotes omitted)).

[140] Justice Scalia argued: "It is beyond question that Virginia has an important state interest in providing effective college education for its citizens. That single-sex instruction is an approach substantially related to that interest should be evident enough from the long and continuing history in this country of men's and women's colleges." *VMI VI*, 116 S. Ct. at 2296 (Scalia, J., dissenting). As the Court noted in *Hogan*, this argument is not responsive to the question of why the benefit is only conferred on one gender. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731

Like Justice Powell in *Hogan*, Justice Scalia argued that the State also had an important interest in providing a diverse educational system. He criticized the majority's dismissal of the diversity justification, saying that "[t]he apparent theory of this argument is that unless Virginia pursues a great deal of diversity, its pursuit of some diversity must be a sham."[141]

The dissent also criticized the majority's disregard of the findings of the district court on the developmental differences between men and women "in favor of the Justices' own view of the world."[142] Scalia argued that a "legitimate pedagogical basis" existed for the different approaches employed by VMI and VWIL.[143] He recounted the trial testimony about the research and careful planning that Virginia (with the help of professional educators) engaged in to produce VWIL and said the "Court simply declares, with no basis in the evidence, that these professionals acted on '"overbroad" generalizations.'"[144]

He also rejected the idea that the majority could effectively narrow its holding by focusing on the "uniqueness" of VMI, believing that the Court's mode of analysis would always find something unique about a given institution or program.[145]

Justice Scalia concluded his dissent by commenting on the recent movement among educators to experiment with single-sex schools. He said that the majority opinion did a major disservice to this type of experimentation, since no school district or state would ever want to offer diversity in the face of great litigation costs.[146] In sum, he said:

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n.17 (1982).

Justice Scalia further argued that offering only men the opportunity for single-sex education was justifiable because "Virginia's financial resources ... are not limitless" and VMI maximized these limited resources by allowing the state to "fund one public all-male institution and one on the adversative model." *VMI VI*, 116 S. Ct. at 2297 (Scalia, J., dissenting). He did not question the district court's conclusion that women and the adversative method were inherently incompatible. *See id.* (noting that the district court found that the admittance of women would lead to the end of the adversative method at VMI).

[141] *VMI VI*, 116 S. Ct. at 2299 (Scalia, J., dissenting). This argument fails according to Scalia, because it ignores Virginia's limited resources and because Virginia gauges the diversity of its system by looking at both the public and the private offerings, for which it provides money and other types of support. *See id.*

[142] *Id.* at 2301.

[143] *Id.* at 2303 (quoting *VMI III*, 852 F. Supp. 471, 481 (W.D. Va. 1994)).

[144] *Id.*

[145] *See id.* at 2305-06 ("I suggest that the single-sex program that will not be capable of being characterized as 'unique' is not only unique but nonexistent." (footnote omitted)).

[146] *See id.* at 2306 (discussing Detroit's failed attempt at single-sex education and

"Today . . . change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court."[147]

III. ANALYZING THE CONSTITUTIONALITY OF YWLS IN LIGHT OF *VMI* AND THE PRECEDING JURISPRUDENCE

Despite the Supreme Court's recent invalidation of a single-sex institution,[148] the constitutional validity of single-sex public schools is far from self-evident. Although Justice Scalia forecasted a future sans the option of publicly funded single-sex schools,[149] the majority's emphasis on the "unique educational opportunities"[150] that VMI offered, suggests the possibility that the dissent may be overstating the majority's holding. Thus, it is not a foregone conclusion that the Young Women's Leadership School is unconstitutional. The best way to determine the constitutionality of single-sex public schools is to parrot the Supreme Court's method of analysis. Exploring the issue this way will illuminate the direction that jurisprudence in this area will take as well as reveal the constitutionality of YWLS in particular.

First, this Comment will discuss the proper level of scrutiny with which to assess the constitutionality of YWLS. Then, this Comment will discuss and analyze the justifications District Four might offer.

A. *Proper Level of Scrutiny*

The level of scrutiny employed to judge the constitutional validity of gender classifications is called "intermediate" or "heightened" scrutiny.[151] As its name implies, it falls on the spectrum between rational

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concluding "[t]oday's opinion assures that no such experiment will be tried again"). To emphasize the importance he believes state experimentation should be accorded, he quoted Justice Brandeis: "[O]ne of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 2308 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)) (Brandeis, J., dissenting). *But cf.* Hsiao, *supra* note 14, at 114 ("If the Supreme Court had yielded to local community decisions in Brown, many schools might still be racially segregated by law." (footnote omitted)).

[147] *VMI VI*, 116 S. Ct. at 2293 (Scalia, J., dissenting).

[148] *See id.* at 2287.

[149] *See id.* at 2305 (Scalia, J., dissenting) ("Under the constitutional principles announced and applied today, single-sex public education is unconstitutional.").

[150] *Id.* at 2269.

[151] *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important government objectives and must be substantially related to achieve-

basis review[152] and strict scrutiny.[153] Supporters of this scrutiny level argue that it allows courts to filter out laws based on invidious stereotypes while allowing other laws that are based on the so-called "true" differences that exist between men and women, or, as here, boys and girls.[154] Critics claim that this flexibility can lead to unprincipled decisionmaking.[155] Critics also argue that the real point of the Equal Protection Clause can get lost in all the "substantial" and "important" rhetoric.[156]

Whatever its attributes or drawbacks, the Supreme Court ostensibly applied this level of scrutiny in *VMI* despite the fact that the United States asked the Court to apply the more stringent strict scrutiny.[157] The Court did, however, reserve for a future case the question of whether strict scrutiny might ever be applied to gender classifications.[158] Noteworthy was the majority's repeated invocation of the phrase "exceedingly persuasive justification" which suggests that the Court might have applied a heightened form of intermediate scrutiny or, perhaps, even strict scrutiny.[159] The higher the level of scrutiny

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ment of those objectives.").

[152] Courts will not strike down classifications subject to mere rational basis review so long as there is a "plausible reason" for the classification. *See* United States R. R. Retirement Bd. v. Fritz, 449 U.S. 166, 178 (1980) ("Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed ... had a greater equitable claim ... than the members of appellee's class who were no longer in railroad employment ....").

[153] Classifications subject to strict scrutiny must be "necessary" to achieve a "compelling" government interest. *See* Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding that the "effects of racial prejudice ... cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody" (footnote omitted)).

[154] *See* Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education:* United States v. Virginia *and Virginia Military Institute*, 6 SETON HALL CONST. L.J. 999, 1001 (1996) (arguing that strict scrutiny is inappropriate for gender classifications because unlike in racial classifications, "there are real differences between men and women .... The only fair way to proceed is to take an open-minded inquiry into the substance and purpose of the classification").

[155] *See* Bennett L. Saferstein, Note, *Revisiting* Plessy *at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 639-40 (1993) (describing the intermediate scrutiny standard as "'so diaphanous and elastic as to invite subjective judicial preferences or prejudices ... masquerading as judgments'" (quoting *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting)).

[156] *Id.* at 640 ("When unique and valuable educational opportunities are made available to only one sex, the nebulous intermediate scrutiny standard can be used to obscure this prima facie denial of equal protection.").

[157] *See VMI VI*, 116 S. Ct. 2264, 2275 (1996).

[158] *See id.*

[159] *See, e.g., id.* at 2294, 2306 (Scalia, J., dissenting) (claiming that the Court's nine

that the Court employs, the less likely it is that the YWLS will pass constitutional muster.[160]

For the purposes of this analysis, this Comment assumes that courts will, at least in form, apply an intermediate level of scrutiny. The substance, however, is governed by the Supreme Court's reasoning in *VMI* and the other precedent-setting cases. Thus, if courts engage in a heightened form of intermediate scrutiny, the mode of analysis should reflect it.

The first part of the intermediate scrutiny test focuses on the state's reason for its discriminatory classification. For the state to meet its burden, its objective must be deemed "important."[161] Three vital requirements of this prong are that the interests put forth by the government be "genuine" and not a purpose concocted "*post hoc* in response to litigation."[162] Further, the justification must "not rely on

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mentions of the phrase resulted in "a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny"); Cohen v. Brown University, 101 F.3d 155, 190 (1st Cir. 1996) (Torruella, C.J., dissenting) ("Rather than simply apply the traditional test ... the Supreme Court applied a more searching 'skeptical scrutiny ....'" (citation omitted)), *petition for cert. filed*, 65 U.S.L.W. 3599 (U.S. Feb. 18, 1997) (No. 96-1321); *see also* John J. Ross, *The Employment Law Year in Review*, 547 PLI/LIT 9, 42 (1996) (arguing that it appears gender classifications will receive more intense scrutiny in the future). It should be noted, however, that the *VMI* Court did not invent the phrase, "exceedingly persuasive justification," and that the Court in fact, has used it in numerous precedents. *See id.* at 183 n.22 ("The phrase 'exceedingly persuasive justification' has been employed routinely ... and is, in effect, a short-hand expression of the well-established [intermediate scrutiny] test." (citing J.E.B. v. Alabama, 511 U.S. 127, 136-37 (1994)); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979). Perhaps the middle ground between these two stands most accurately captures the Court's position on the proper level of scrutiny to afford gender classifications. *See* Udell, *supra* note 95, at 553 ("Justice Ginsburg .... is moving the Court, gradually and strategically, to a point where it will finally endorse strict scrutiny for gender classifications.").

[160] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that [suspect] classifications ... be subjected to the 'most rigid scrutiny,' and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the ... discrimination which it was the object of the Fourteenth Amendment to eliminate." (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)). *But cf.* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (clarifying that strict scrutiny is not "fatal in fact" and that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test").

[161] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) ("However the discrimination is described in this case, our precedents require that gender-based discriminations must serve important governmental objectives ....").

[162] *See VMI VI*, 116 S. Ct. at 2275; *see also Hogan*, 458 U.S. at 730 & n.16 (noting that a state may not just recite a purpose but has the burden of establishing an actual pur-

overbroad generalizations about the different talents, capacities, or preferences of males and females."[163] Finally, the "mere recitation of a benign, compensatory purpose" does not prevent "inquiry into the actual purposes underlying the statutory scheme."[164]

The second part of the test requires that the classification itself substantially relate to the state's accomplishment of its important objective.[165] When analyzing a case in light of this requirement, it is crucial to remember an enlightening axiom. The *Hogan* Court, responding to Justice Powell's argument in dissent that providing women with the choice of single-sex education substantially relates to the goal of providing diversity, stated:

> Since any gender-based classification provides one class a benefit or choice not available to the other class . . . that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.[166]

Thus, in the context of single-sex schools, the state must show not that a single-sex school substantially relates to a beneficial end for the class advantaged by the classification, but instead, that excluding one sex from the benefit substantially relates to its goal.

This Comment will consider three purposes that District Four may assert and analyze whether courts will deem them "important" and whether the means of single-sex education "substantially relate" to their accomplishment. Recall that the state has the burden of establishing "an exceedingly persuasive justification."[167]

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pose for the classification).

[163] *VMI VI*, 116 U.S. at 2275. *But see* Finley, *supra* note 132, at 1125 (criticizing the emphasis on stereotypes because it "keeps the focus on women rather than on the operative male-normed institutions").

[164] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); *see also Wengler*, 446 U.S. at 147 ("Although the Missouri Supreme Court was of the view that the law favored, rather than disfavored, women, it is apparent that the statute discriminates against both men and women.").

[165] *See* Califano v. Westcott, 443 U.S. 76, 85 (1979).

[166] *Hogan*, 458 U.S. at 731 n.17.

[167] *See VMI VI*, 116 S. Ct. at 2274.

B. *Non-Exceedingly Persuasive Justifications*

1. Diversity

Diversity and the related goal of experimentation are almost invariably brought up by state actors to justify single-sex schools.[168] The poor quality of many of the nation's schools has led reformers at the state level to argue forcefully that they need leeway to try various educational experiments.[169] In *VMI*, the issues of the beneficial effect of single-sex education on some students and whether diverse educational choices "can serve the public good" were not contested.[170] Instead, the Supreme Court rejected Virginia's assertion that the diversity goal actually motivated the State.[171] The Court also indicated that it will not accept this rationale unless both sexes are benefited by the

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[168] *See, e.g.*, *VMI I*, 766 F. Supp. 1407 (W.D. Va. 1991) (stating that VMI sought to justify its exclusion of women as promoting diversity in education). The term "diversity" has also been frequently used in the affirmative action context to justify racial classifications. *See* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1848 (1996) ("So sweet is 'diversity' to the legal ear that the term has become the preferred euphemism for the déclassé phrase 'affirmative action.'"). The interesting twist on the term here is that in the affirmative action context, diversity stands for the goal of including many different voices and experiences in an environment (for example, a school), so that everyone's educational experience is enriched. *See* Cheh, *supra* note 124, at 60. The use of the "diversity" justification differs remarkably when applied to single-sex schools: "[D]iversity in the VMI context is a reason to exclude, or to isolate and separate, constituent groups." *Id.* at 60-61 ("'Diversity' has too many potential meanings and too many negative possibilities to be blithely accepted as an all-purpose justification.").

[169] *See Single-Sex Public Schools*, AMERICA, Sept. 14, 1996, at 3, 3 ("[T]he current system of compulsory coeducation in most public high schools is not working for many young boys and girls. Nonsexist experiments with single-sex schools are surely worth a try."); *see also* Leo, *supra* note 27, at 18 ("Why can't we extend to minority and poor youngsters the same option for single-sex education that well-off parents exercise when they send their daughters to the fancy, private girls' schools found all over Manhattan?"). District Four, where the school is located, has a reputation for educational innovation. *See id.* (noting that the district already has 23 alternative schools "including three concentrating on math and science, two on the performing arts, a writing school, a prep school and a maritime school").

[170] *See VMI VI*, 116 S. Ct. at 2276-77 ("Single-sex education affords pedagogical benefits to at least some students . . . and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good." (footnote omitted)). At least one commentator asserts that in these remarks the Court "admitted that . . . diverse educational opportunities, including single-sex education, could serve important governmental interest." *Leading Cases*, *supra* note 121, at 175. However, "admitted" seems too strongly put—the Court merely acknowledged that diverse educational opportunities were beneficial, it certainly did not explicitly say single-sex education qualified as an important governmental interest.

[171] *See VMI VI*, 116 S. Ct. at 2279.

diversity.[172] True educational diversity, it appears, would encompass something akin to single-sex schools for each sex. If District Four decides to create a counterpart to YWLS for boys, then the issue of the constitutionality of an evenhandedly diverse system rises to the fore.

a. *The Constitutionality of "Separate but Equal" Schooling in the Gender Context*

"Separate but equal," the constitutional doctrine originating in *Plessy v. Ferguson*[173] and discredited in *Brown v. Board of Education*,[174] has not been rejected or explicitly retained by the Court in the area of sex discrimination.[175]

The reasoning of *Brown* supports the interpretation that its holding applies to sex classifications.[176] The *VMI* Court echoed this under-

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[172] *See id.* at 2276 n.7 ("We do not question the State's prerogative *evenhandedly* to support diverse educational opportunities. We address specifically and only an educational opportunity recognized . . . as 'unique.'" (emphasis added)). For an insightful analysis and critique of the diversity justification, see Saferstein, *supra* note 155, at 656-57 ("The logical flaw with this argument is that it substitutes the means for the ends in the scrutiny formula. The object is not to attain diversity per se, but to attain the best possible educational system.").

[173] 163 U.S. 537, 551 (1896) (holding "separate but equal" treatment not violative of the Equal Protection Clause).

[174] 347 U.S. 483, 495 (1954) (overturning the "separate but equal" doctrine and holding that "separate educational facilities are inherently unequal").

[175] Although the Court summarily affirmed the Third Circuit's decision in Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by an equally divided Court*, 430 U.S. 703 (1977), which relied on "separate but equal" reasoning, the Supreme Court's reasoning for doing so is not known. *See supra* Part II.A.2. The Court declined to address the constitutionality of "separate but equal" systems in both *Hogan*, 458 U.S. at 720 n.1 ("[W]e are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females.") and *VMI VI*, 116 S. Ct. at 2276 n.7 ("We do not question the State's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized . . . as 'unique.'"). *See also* Patricia Werner Lamar, Comment, *The Expansion of Constitutional and Statutory Remedies for Sex Segregation in Education: The Fourteenth Amendment and Title IX of the Education Amendments of 1972*, 32 EMORY L.J. 1111, 1113 (1983) (arguing that in *Hogan*, the Supreme Court was able to avoid the "separate but equal" issue because the male plaintiff did not claim that the state had a duty to create an all-male nursing school). Despite the Court's vagueness regarding its position on "separate but equal" in the sex context, some critics argue that the assumptions embedded in the doctrine maintain a strong hold over sex discrimination jurisprudence. *See* Finley, *supra* note 132, at 1089 ("[W]hen one focuses on the jurisprudence of equality on the basis of sex or gender, it appears that far from being buried, *Plessy* is quite alive and well.").

[176] *See Brown*, 347 U.S. at 495 ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."); Sharon K. Mollman, Note, *The Gender Gap: Separating the Sexes in Public Educa-*

standing when it quoted scholars who likened all-male institutions to all-white institutions, implying that just as the latter reinforces ideas of white supremacy, the former contributes to the perpetuation of a patriarchal society.[177] Thus, the possibility exists that the Court would find separate but equal schooling to be inherently defective, as it did in the racial context.

Other aspects of the *VMI* opinion point in the opposite direction. For instance, the Court evaluated VWIL's adequacy as a remedy using analysis gleaned from *Sweatt v. Painter*.[178] *Sweatt*, decided under the separate but equal doctrine, held that the University of Texas had to open its doors to African-American students because the parallel law school that Texas established was not equal, as evaluated by tangible and intangible characteristics.[179] In *VMI*, the Court made clear that if separate educational facilities for men and women have any hope of passing constitutional muster, the State must demonstrate "substantial equality in the separate educational opportunities."[180] One can understand the majority's invocation of *Sweatt* and its analysis to imply that the separate but equal doctrine is appropriate in the gender discrimination context. If the Court really wanted to disavow the doctrine, it could have done so and foregone the second half of the opinion.

The *VMI* Court also quoted at length from Fourth Circuit Court of Appeals Judge Phillips's dissenting opinion, which argued that separate but equal institutions were acceptable so long as they were "substantially comparable" in all aspects.[181] Other language in the

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tion, 68 IND. L.J. 149, 157 (1992) ("The anti-subordination basis for *Brown*'s abrogation of separate but equal schools in the racial context supports its elimination in the gender context as well."); *see also* Faulkner v. Jones, 51 F.3d 440, 450 (4th Cir. 1995) (Hall, J., concurring) (arguing that separate educational facilities "will inevitably fall short of providing women their deserved access to important avenues of power and responsibility").

[177] *See VMI VI*, 116 S. Ct. at 2277 n.8 (quoting CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 297-98 (1968)).

[178] 339 U.S. 629 (1950).

[179] *See id.* at 633-36, 634 ("[T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement .... Such qualities ... include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.").

[180] *VMI VI*, 116 S. Ct. at 2286 (citing *Sweatt*, 339 U.S. at 636); *see also* Women Prisoners v. District of Columbia, 93 F.3d 910, 955 (D.C. Cir. 1996) (Rogers, J., dissenting) ("Even assuming the government may constitutionally provide separate but equal programs for the sexes, the programs must be substantially equivalent.").

[181] *See VMI IV*, 44 F.3d 1229, 1250 (4th Cir. 1995). For an analysis of the proper

opinion suggests that the Court might be amenable theoretically to the prospect of separate but equal schools in the sex context. The Court limited its holding by noting that VMI was "unique" in Virginia.[182] One meaning of "unique" found in the opinion was that VMI was the sole single-sex school in the state.[183] Thus, the limitation might suggest that a separate but (truly) equal counterpart to VMI would have alleviated the constitutional violation.

Even if the Court decided that *Brown*'s reasoning does not prohibit separate but equal arrangements in the sphere of sex classifications, as a practical matter, few, if any, separate but equal school systems would pass muster. As the design of YWLS and Detroit's Academies demonstrate, school districts tailor their single-sex schools to perceived "tendencies" of the sex for whom the school is intended. It is likely that single-sex schools promulgated by school districts will contain disparate programs depending on the sex for whom the school was designed. The *VMI* Court explicitly frowned upon reliance on such generalizations[184] by disregarding the findings of the district court on female and male preferences and differences and noting that *some* women have the drive and capability to be a VMI cadet: "It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted."[185]

This reasoning applies to the possible all-boys counterpart that District Four is considering. Unless District Four reproduces YWLS in all or nearly all of the school's many tangible and intangible characteristics,[186] the purpose of diversity would not justify denying a claimant an educational benefit the other sex enjoyed. Once again, *even if*

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manner to determine whether institutions are truly equal, see Saferstein, *supra* note 155, at 669-72 (proposing a balancing test which weighs the benefits of the single-sex environment against the burdens placed on the sex "relegated to the lesser of the two schools"). *But see Women Prisoners*, 93 F.3d at 926 (interpreting *VMI* to require comparable funding and curriculum scope, but not identical programs).

[182] *VMI VI*, 116 S. Ct. at 2276 & n.7 ("We address specifically and only an educational opportunity recognized . . . as 'unique,' an opportunity available at Virginia's premier military institute, the State's sole single-sex public university or college." (citation omitted)).

[183] In framing the case's second issue, the Court asked whether "VMI's 'unique' situation—as Virginia's sole single-sex public institution of higher education—offends the Constitution's equal protection principle." *Id.* at 2274 (citation omitted).

[184] *See id.* at 2280 ("[W]e have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia . . . .").

[185] *Id.* at 2284.

[186] Unlike VMI, YWLS has not existed long enough to make it impossible for an incipient boys school to attain substantial equality as measured by intangible factors like its reputation and prestige.

the Court would consider diversity to be "important," the Court will only consider the State's actual purpose to be the promotion of educational diversity when the benefits are allotted evenhandedly and when the offerings are "substantially equal." A true diversity objective thus merges into separate but equal analysis.

b. *The Efficacy of the "Unique" Limitation*

This merger exposes the thinness of the "unique" limitation, which the Court suggested constrained its holding.[187] The word "unique" appears to have two definitions in the *VMI* opinion. First, the Court uses it to mean "Virginia's sole single-sex institution of higher education."[188] Second, it means that no remotely comparable educational opportunities existed for women in Virginia.[189] But for the sex of their students, two schools that are considered separate but equal, are, by definition, not "unique." If East Harlem sets up an all-boys counterpart to YWLS, the foregoing analysis of the separate but equal principle will govern. If the boys school was not "substantially equal," the district could not hope to win with the diversity rationale.

At present, however, YWLS fits the first definition of "unique" because it is the sole single-sex school offered by District Four. Recall that District Four sought to ensure that YWLS offered nothing unique (by offering enhanced math, science and leadership classes at other district schools). Nonetheless, YWLS most likely remains "unique" according to the second definition employed by the *VMI* Court, because no other district school likely offers all the tangible and intangible benefits that YWLS offers its students, such as class size,[190] teaching method,[191] facilities[192] and atmosphere.[193] A male applicant denied admission to YWLS would have a strong claim against the school because he was denied something he could not get elsewhere.[194]

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[187] *See supra* note 182 and accompanying text.

[188] *See VMI VI*, 116 S. Ct at 2274.

[189] *See id.* at 2283 (noting that VWIL failed to offer to women the type of training and environment that made VMI distinctive).

[190] *See, e.g.*, Steinberg, *supra* note 17, at 21; Henry, *supra* note 2, at 1D.

[191] *See* Sanchez, *supra* note 6, at A8 (connecting the change in teaching methods with recent studies showing "that girls and boys tend to respond to different teaching styles").

[192] *See* Willen, *supra* note 8, at A68.

[193] *See* Steinberg, *supra* note 17, at 21.

[194] In *Hogan*, the plaintiff's burden was rooted in convenience. MUW housed the closest nursing school to his home and job. Thus, although MUW offered nothing unique, he demonstrated an injury or burden placed upon him solely because of his

The "unique" limitation is also seriously circumscribed by the *Hogan* Court's analysis. Although the *VMI* Court did emphasize VMI's uniqueness, the *Hogan* Court spoke in broader terms: "Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."[195] This implies that no real burden (other than the denial of admission to a school solely on the basis of sex) need be demonstrated by the plaintiff.[196] This analysis renders the "unique" limitation all but meaningless.

In sum, the Court's stance on "separate but equal" cannot be definitively discerned. If it ultimately decides to accept the principle in the sex discrimination sphere while at the same time remaining faithful to its reasoning in *Hogan* and *VMI*, the concept will not ensure the opening of many single-sex schools. Likewise, the "unique" limitation faces similar constraints when examined in light of the Court's general analysis. Since the Court will not recognize the importance of the diversity justification unless the State provides "substantially equal" and nonunique educational opportunities, YWLS is not likely to win on this argument.

2. Improving the Quality of Education

District Four could also argue that coeducational schools do not always serve the needs of its students and that some students would benefit from a single-sex educational environment. In the *VMI* opinion the Supreme Court did not challenge the notion that educational benefits might flow from single-sex education.[197] The Court also re-

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sex. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.8 (1982) ("Hogan's female colleagues had available an opportunity, not open to Hogan .... The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan 'a burden he would not bear were he female.'" (quoting Orr v. Orr, 440 U.S. 268, 273 (1979))).

[195] *Hogan*, 458 U.S. at 723.

[196] *But cf.* Saferstein, *supra* note 155, at 682 (arguing that if school districts set up three experimental academies simultaneously, one for girls, one for boys, and one co-ed, equal protection would be satisfied because "[b]y ensuring that every educational opportunity available to one sex is also made available to the other sex, the project cannot be said to discriminate in favor of either sex").

[197] *See VMI VI*, 116 S. Ct. at 2276-77 ("Single-sex education affords pedagogical benefits to at least some students ...."). *But cf.* Faulkner, 51 F.3d at 451 (Hall, J., concurring) ("[T]hough VMI, The Citadel, and their advocates have ceaselessly insisted that education is at the heart of the debate, I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later.").

ferred to the district court's finding that women appear to flourish more than men in a single-sex setting.[198] But, as shown above, the Court requires states to "evenhandedly" distribute benefits to the sexes,[199] and the school district here does not yet offer an all-male alternative. Thus, if a school like YWLS wants to succeed on this argument, it must establish that girls do not receive optimal education under the current system.[200] Correspondingly, it would need to demonstrate that under a system where girls had a single-sex option, boys would not be denied any benefit because boys thrive in co-educational settings which the State already offers.[201]

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[198] *See VMI VI*, 116 S. Ct. at 2277 n.8 (noting the district court's finding that "beneficial effects [of single-sex education] are stronger among women than among men"); *cf.* FLORENCE HOWE, MYTHS OF COEDUCATION 209 (1984) ("Coeducation ... functions within the patriarchal limits of the society in which it exists.").

[199] *See generally* Barbara Anne Murphy, *Education: An Illusion for Women*, 3 S. CAL. REV. L. & WOMEN'S STUD. 19, 24 (1993) ("The crime is not that female students do not receive the 'same' education as male students, but that this deficiency alters women's identity for their entire lives."). Although some commentators point to statistics showing women's majority status in colleges and graduate schools as proof that public education does not discriminate, it is informative that "the average woman with a college degree earns the same as a man with only a high school diploma." *Id.* at 23. Murphy also argues that schools socialize girls and "impose upon girls a restricting set of sexual stereotypes that discourage their aspirations and limit their sense of autonomy and self-image." *Id.* at 27 (citation omitted). *But see* Blair, *supra* note 154, at 1009-12 (attempting to show statistically that women are "emancipated," not economically and politically powerless citizens).

[200] Students at YWLS report that when they attended co-ed public school they noticed preferential treatment of male students and that male students dominated classroom discussion. *See* Sanchez, *supra* note 6, at A8 (quoting a female student who noted that in YWLS she no longer spends time "'groveling all day at the feet of some guy'"); *see also* AMERICAN ASS'N OF UNIV. WOMEN, THE AAUW REPORT: HOW SCHOOLS SHORTCHANGE GIRLS at v (1992) [hereinafter HOW SCHOOLS SHORTCHANGE GIRLS] (contending that there is "compelling evidence that girls are not receiving the same quality, or even quantity, of education as their brothers"). *But see* Leo, *supra* note 27, at 18 (repudiating the 1992 AAUW study that found large educational inequities as politicized and highly misleading, and noting that a more balanced study found that "'not all academic outcomes favor boys, nor are they as large as some recent public discussions would imply'" (quoting Valerie Lee, author of the more recent study)).

[201] *See* Beth Willinger, *Speeches: Single Gender Education and the Constitution*, 40 LOY. L. REV. 253, 255-58 (1994) (discussing her research, which suggests that women benefit tremendously from single-sex education while men "[b]asically... have the same educational experience"); *see also Parenting Today* (CNN television broadcast, Oct. 26, 1996) ("'Teachers teach boys and girls differently. So, sitting next to each other in the same room, boys get a far more intense education than girls.'" (quoting David Sadker)). *But see* Rogers Worthington, *Milwaukee Idea Shapes a New School*, CHI. TRIB., Dec. 1, 1991, at 25C, 31C ("[B]lack boys are a special-needs population who aren't being served in public schools 'as they exist.'" (quoting a senior research associate at the clearinghouse on urban education at Columbia Teachers College)).

However, the language in *VMI* that emphasized individual "talents, capacities, or preferences"[202] makes it probable that courts will not want or be able to rely on generalizations about "all boys" and the type of educational setting in which they would thrive.[203] Since there are studies that indicate, and scholars who advocate, that boys might benefit from single-sex education,[204] courts would reject this purpose.

Vocal critics of the idea that separating girls is the only way to improve their education agree with the Court's disdain for stereotypes based on supposed biological differences and antiquated ideas about gender roles. They argue that such classifications inevitably rely on, and therefore further perpetuate, invidious notions (such as "girls are bad at math" and "boys are disruptive") that would become even further entrenched if courts accepted the "improving education" purpose as legitimate.[205]

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[202] *VMI VI*, 116 S. Ct. at 2275.

[203] *See id.* at 2269 ("Neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to *some* women." (emphasis added)).

[204] *See, e.g.*, GROSSMAN & GROSSMAN, *supra* note 8, at 147 ("[M]ales also gain from attending all-male elementary and secondary schools."); Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 287-88 (1994) ("[C]o-educational institutions do precious little to emphasize basic male development and character-building .... Both sexes stand to benefit from an educational program that is sensitive to their unique educational and social needs."). *But see* Mollman, *supra* note 176, at 167 ("Boys in co-ed classes ... gain a higher opinion of themselves and of their gender, increasing their self-esteem.").

[205] *See* Janine Zuniga, *Civil Rights Groups Fight Girls-Only School*, RECORD (N.J.), Aug. 23, 1996, at A4, *available in* 1996 WL 6104766 (quoting Michael Meyers, a New York Civil Rights Coalition attorney, as saying "'children will be taught ... that the mere presence of boys in the same classroom is a disruptive influence'" (alteration in original)); *see also* Mollman, *supra* note 176, at 169 ("The social cost of excluding boys is not their subsequent feelings of inferiority, for their sense of power is too well entrenched. Instead they perceive that girls are inferior because they will not compete with boys."); *cf. Opposing All-Male Admission Policy at Virginia Military Institute: Amicus Curiae Brief of Professor Carol Gilligan and the Program on Gender, Science, and Law*, 16 WOMEN'S RTS. L. REP. 1, 10 (1994) ("The record is thus replete with classic, time-worn generalizations picturing women as passive, men as aggressive; women as peaceful, men as violent; women as cooperative, men as competitive; women as 'connected,' men as independent; women as consensus-builders, men as authoritarian."); *cf. also* Hsiao, *supra* note 14, at 109 ("[T]he perception that African American females are far outperforming African American males educationally and socially not only ignores the equally pressing problems faced by females, but also may prove stigmatizing and demoralizing for males ....").

This problem of harming rather than helping the class singled out by a classification plagues benign classifications. In *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643

Furthermore, the new trend of many educators to turn to single-sex education as a means of fixing public education shifts the focus away from the real obstacles facing inner-city youth,[206] such as poverty, crime, unemployment and numerous other societal ills.[207] And, as the district court in *Garrett v. Board of Education* noted, the absence of one sex, rather than the enhanced educational offerings, will undoubtedly receive the credit for a single-sex program's success.[208]

IV. THE EXCEEDINGLY PERSUASIVE JUSTIFICATION: COMPENSATION

A. *YWLS Serves a Compensatory Purpose*

The third justification the State may argue is that YWLS serves a compensatory purpose.[209] In *VMI*, the Court acknowledged the possi-

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(1975), Congress passed an amendment designed to protect the family unit. While the amendment made ample provisions for widows with children, "no benefits whatever were made available to husbands or widowers on the basis of their wives' covered employment." *Id.* at 643-44. Although the government proffered a compensatory purpose, the operation of the classification in actuality had a "pernicious" effect for women: "[S]he not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she was also deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Id.* at 645; *see also* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 147 (1980) (noting that a Missouri law discriminated against both sexes because men only sometimes got a death benefit and "[t]he benefits . . . that the working women c[ould] expect to be paid to her spouse in the case of her work-related death [we]re less than those payable to the spouse of the deceased male wage earner"). Ruth Bader Ginsburg, as a lawyer, sought to expose this double-edged quality to benign classifications. *See* Udell, *supra* note 95, at 527.

[206] *See* Garrett v. Board of Educ., 775 F. Supp. 1004, 1007 (E.D. Mich. 1991) (reiterating the plaintiffs' argument that the defendant school board's data "ignores the fact that *all* children in the Detroit public schools face significant obstacles to success" (emphasis added)); *cf.* Truely & Davis, *supra* note 5, at 737-38 (arguing that an "anti-female ideology" underlies many of the new proposals aimed at improving inner-city public education).

[207] *See* Truely & Davis, *supra* note 5, at 726 (noting that African-American inner-city youths are disproportionately affected by unemployment, homelessness and crime).

[208] *See supra* notes 90-91 and accompanying text; *see also, e.g.*, Hsiao, *supra* note 14, at 111-12 ("The all-male classroom experiments do not demonstrate that the success of these males depends on excluding females; rather, they show the potential of high quality education for those children who receive it."); Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1118 (1993) (noting that critics of African-American boys schools fear that "the all-male factor will receive disproportional credit for the success").

[209] For a comprehensive discussion on benign, compensatory purposes for discriminatory classifications, see Fred von Lohmann, Note, *Single-Sex Courses, Title IX, and Equal Protection: The Case for Self-Defense for Women*, 48 STAN. L. REV. 177 (1995) (arguing that because of the disproportionate amount of sexual violence directed at

bility that a compensatory rationale might be an "exceedingly persuasive justification" when it noted that classifications based on sex might be permissible where they compensate women for "particular economic disabilities," further equal opportunity, or "advance full development of the talent and capacities of our Nation's people."[210] In *Hogan*, the Court also acknowledged that a compensatory purpose might be proper.[211] The discrimination that the district seeks to remedy might be educational or societal,[212] however, the Court requires that there be a fairly tight means-end fit.[213] This means not only that the discriminatory classification must be substantially related to the State's goals but also that the class discriminated against has played a role in creating the benefited class's situation.[214] In *Hogan*, the state of Mississippi put forth a benign, compensatory purpose to justify its maintenance of an all-women's nursing school but the Court rejected it because the State did not establish that it was actually motivated by

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women, single-sex self-defense classes do not violate the Equal Protection Clause). *Cf.* Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 173 (1986) ("[I]nvoking the compensatory purpose doctrine is appropriate in situations where acting in a 'sex-blind' or 'equal' manner would result in perpetuating existing inequalities."). *But cf.* John Leo, *Girls-Only Public School Is an Idea Worth Trying*, PLAIN DEALER (Cleveland), July 31, 1996, at 11B, *available in* 1996 WL 3563703 (arguing that "[v]ictim theory requires constant reminders of oppression, deprivation and second-class status to justify girls-only schools.... [I]f the school is to become permanent, it logically depends on finding more and more patriarchal oppression to justify it").

[210] *VMI VI*, 116 U.S. at 2276 (citations omitted).

[211] *Hogan*, 458 U.S. at 728 ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); *see also* von Lohmann, *supra* note 209, at 201 ("[G]eneral societal discrimination alone will support voluntarily affirmative action plans aimed at assisting women.").

[212] *See Hogan*, 458 U.S. at 729 (noting that Mississippi failed to show that female nurses were denied opportunities in either obtaining education or within the field).

[213] *See id.* at 728 ("[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."); *see also* Califano v. Goldfarb, 430 U.S. 199, 209 (1976) (acknowledging that "redressing our society's longstanding disparate treatment of women" is a permissive purpose (citing Craig v. Boren, 429 U.S. 190, 198 n.6 (1976))).

[214] *See supra* notes 90-91 and accompanying text (noting the *Garrett* court's premonition that it is unlikely that defendant can prove the second prong because it has not shown that the exclusion of females from the Academies are needed to fight unemployment and high dropout and homicide rates, and because no evidence exists that the Detroit system fails its boys because of the presence of girls); *see also* Feldblum et al., *supra* note 209, at 212 (noting that in *Hogan* the fact that men audited the nursing classes indicated that their exclusion was not necessary to achieve the State's goals and thus, a sufficient relation did not exist between the means and the end).

the benign purpose[215] and because the Court concluded that no affirmative action for women was needed in the nursing profession since women accounted for over ninety percent of all nurses.[216] The Court also noted that the maintenance of the all-women nursing school actually harmed women by further entrenching the notion that nursing was a women's profession.[217]

Unlike in *Hogan*, evidence suggests that compensatory purposes motivated YWLS at least in part.[218] Moreover, contrary to the nursing profession, there is a dearth of women leaders[219] and men tend to

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[215] *See Hogan*, 458 U.S. at 728 ("'[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.'" (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975))).

[216] *Id.* at 729 ("Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities."). For a discussion that substantiates the need for compensation in areas such as male-dominated professions, see Elizabeth Monk-Turner, *Sex Differentials in Unemployment Rates in Male-Dominated Occupations and Industries During Periods of Economic Downturn*, *in* GENDER DIFFERENCES: THEIR IMPACT ON PUBLIC POLICY 89, 91 (Mary Lou Kendrigan ed., 1991) ("There has been little change in the proportion of women employed in male-dominated occupations since 1900. Occupational segregation by sex is more extreme than that by race." (footnote omitted)).

[217] *See Hogan*, 458 U.S. at 729 ("Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively women's job."). The classification might further have injured nurses by keeping their wages depressed. *See id.* at 729 n.15 ("To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit.").

[218] *See supra* notes 22-24 and accompanying text.

[219] *See* Murphy, *supra* note 199, at 22-23. The author states:

> [I]n 1994, there are on the average only three women executives for every one-hundred top executive jobs at the largest companies; there is only one woman lawyer for every four lawyers; there is only one woman doctor for every five doctors; there is only one woman dentist for every eight dentists; there are only 47 women representatives in the United States House of Representatives; there are only seven women senators in the United States Senate; there are only two women United State Supreme Court Justices; and no woman has ever been president or vice-president of the United States.

Id. (footnotes omitted); *see also* DEBORAH L. RHODE, JUSTICE AND GENDER 162-64, 162 (1989) (noting that "wide disparities have persisted in the sexes' vocational status"); *cf.* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion) ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this nation's decisionmaking councils.").

dominate occupations that require math and science backgrounds.[220] Furthermore, studies have shown that girls suffer discrimination in co-ed public schools.[221] Although this evidence should be sufficient to demonstrate that the sex "benefited by the classification did indeed suffer from past discrimination," the Supreme Court has never made entirely clear what type of evidentiary showing is necessary.[222]

These facts about societal disparities between men and women

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[220] *See* Murphy, *supra* note 199, at 22 (noting that most doctors and dentists are men); *see also* NATIONAL CTR. FOR EDUC. STATISTICS, *supra* note 22, at 13 (citing a study that revealed that in 1992, twice as many men as women received degrees in physical sciences and math); *cf.* WOMEN, WORK, & SCHOOL 5 (Leslie R. Wolfe ed., 1991) ("[R]eports . . . suggest that discrimination by race and sex in the job market is largely a result of the sex and race stereotyping . . . in education and training programs.").

In the realm of affirmative action programs aimed at remedying racial discrimination, at least one member of the Supreme Court has said "'[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" Johnson v. Transportation Agency, 480 U.S. 616, 650 (1987) (O'Connor, J., concurring in judgment) (quoting Wygant v. Jackson Board of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring)). Remedying past discrimination by the employer has been upheld as a compelling reason for preferential treatment. *See* United States v. Paradise, 480 U.S. 149, 166 (1987) ("[G]overnment bodies . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination."). Although District Four can avail itself of the less burdensome standard found in sex discrimination jurisprudence, the district could probably meet the tougher race standard by demonstrating that girls have been discriminated against in its co-ed schools, especially in math and science classes.

The composition of YWLS consists mostly of African-American and Hispanic girls from East Harlem. *See* Sanchez, *supra* note 6, at A8. Girls with a history of academic excellence but with disadvantaged backgrounds benefited from a preference in the admission procedure. *See id.* This raises interesting questions about the mode of comparison when establishing a need for compensation: Should the inquiry focus on their neighborhood? On their ethnic group? On society at large? Recall in *Garrett* that the school board argued that Detroit's boys performed worse than its girls. *See* Garrett v. Board of Educ., 775 F. Supp. 1004, 1007 (E.D. Mich. 1991).

[221] *See, e.g.*, HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 200, at 68 & n.1 (citing multiple studies that found that boys receive more attention than girls receive from teachers from preschool through high school); Carolyn Ellis Stanton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 337 (1988) (calling sexual harassment in secondary schools a "disturbing problem"); Mollman, *supra* note 176, at 170 ("Subtle or overt, co-ed schools contain significant gender-based discrimination which serves to limit girls' self-perception and create a sense of inferiority and second-class status.").

[222] *See* von Lohmann, *supra* note 209, at 203 ("In the words of the Third Circuit: 'The Court has upheld gender preferences where no statistics were offered . . . struck down gender preferences despite the presence of statistics . . . and also decided cases both ways by relying in part on statistics . . . .'" (quoting Contractors Ass'n of E. Pa. v. City of Phila., 6 F.3d 990, 1010 (3d Cir. 1993))). Von Lohmann concludes that "*Hogan* teaches that public institutions must produce enough evidence . . . to demonstrate that the asserted compensatory purpose is not merely a cover for archaic stereotypes." *Id.* at 204.

demonstrate that a classification aimed at increasing the number of female leaders and the number of women in male-dominated professions would be "important." The State, however, must also demonstrate that the means YWLS uses substantially relate to that compensatory objective.[223] Because compensatory objectives are generally deemed important, if a state actually motivated by a genuine compensatory purpose fails, it is usually because it has not established that the means it employed were substantially related to that objective.[224]

For example, an Alabama statute that allowed alimony awards only for women failed the second prong of the intermediate scrutiny test in *Orr v. Orr*.[225] The Court reasoned that because individualized hearings already occur in divorce proceedings, the State could easily succeed in its purpose—to compensate women for economic disadvantage due to marriage—without making a categorical rule which denied alimony to men.[226] Thus, "the gender-based distinction is gratuitous" to attainment of the State's purpose.[227] Furthermore, the classification might actually produce "perverse results" by advantaging only "the financially secure wife whose husband is in need."[228] Justice Brennan, writing for the Court, also warned of the potential risk posed by benign, compensatory classifications by noting that such classifications "must be carefully tailored" because they "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[229]

Similarly, in *Garrett*, the State failed to meet the second prong.[230] The school board argued that the Academies would serve a remedial purpose: the Academies aimed at improving the problems facing the city's males.[231] The district court, in enjoining the opening of the

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[223] *See Garrett*, 775 F. Supp. at 1006.

[224] *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730-31 (1982) (finding that the creation of an all-women's nursing school was not related to the state's asserted objective of compensating women for educational discrimination).

[225] 440 U.S. 268 (1979).

[226] *See id.* at 281-82 (explaining that individualized hearings obviate the need "to use sex as a proxy for need").

[227] *See id.* at 282-83 ("[E]ven statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored.").

[228] *Id.* at 282.

[229] *Id.* at 283.

[230] *See Garrett*, 775 F. Supp. at 1008.

[231] *See id.* (explaining the school board's argument that since current coeducational programs do not work and smaller scale all-male programs have improved urban males' lifestyles, its solution was substantially related to its remedial goals); *see also* Hsiao, *supra* note 14, at 102 (explaining that the school board sought to combat

Academies, expressed doubt that the school district could show that the means—excluding girls—substantially related to this very important goal.[232]

In contrast to *Orr* and *Garrett*, the Court in *Califano v. Webster*[233] found the ends and means sufficiently related when it upheld a statutory scheme designed to increase Social Security retirement benefits for women.[234] The statute allowed "women, who as such have been unfairly hindered from earning as much as men," to exclude more low-earning years than men when they calculated their retirement benefits.[235] The Court concluded that the means employed were substantially related to the State's compensatory objective because the statute "operated directly to compensate women for past economic discrimination."[236]

The statute at issue in *Michael M. v. Superior Court*,[237] also overcame the second prong. In a plurality opinion, the Court upheld California's statutory rape law that only punished male offenders, under a compensatory rationale. The plurality stated early in the opinion that if a statutory classification "realistically reflects the fact that the sexes are not similarly situated in certain circumstances," the Court has found that legislatures can "'provide for the special problems of

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"school failure, dropout rates, unemployment, poverty, and violence").

[232] *See Garrett*, 775 F. Supp. at 1008 ("There is no evidence that the educational system is failing urban males because females attend schools with males."). *But see* Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2006 n.8 (1992) (critiquing the district court's constitutional analysis and arguing that the school board's extensive studies of potential remedies for the problems facing urban men revealed that single-sex environments would help solve these problems).

[233] 430 U.S. 313 (1977) (per curiam).

[234] *See id.* at 316. In *Schlesinger v. Ballard*, decided before the adoption of intermediate scrutiny, the Court also found the statutory classification at issue, allowing women naval officers to serve four years longer than their male counterparts, "consistent" with Congress's goal to "provide women officers with 'fair and equitable career advancement programs.'" 419 U.S. 498, 508 (1975) (quoting H.R. REP. NO. 216, at 5 (1968)). The extra years were necessary because women needed more time to compile promotion-worthy records since the Navy circumscribed their ability to obtain seagoing service experience. *See id.* The dissent found it "troublesome . . . that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment imposed directly and currently by the Navy itself." *Id.* at 511 n.1 (Brennan, J., dissenting).

[235] *Califano*, 430 U.S. at 318.

[236] *Id.* (recognizing that the differential in earnings between men and women is partially attributable to discrimination against women in employment).

[237] 450 U.S. 464 (1981) (plurality opinion).

women.'"[238] Instead of the Court's typical skepticism of a state's proffered compensatory purpose, the plurality gave "great deference"[239] to California's asserted purpose—the prevention of teenage pregnancy. Moreover, it anomolously required only that the classification "sufficiently" relate to the State's goal:

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.[240]

Judging from the analysis gleaned from the cases described above, a court should find that YWLS sufficiently relates to the school district's compensatory purposes of "advanc[ing] [the] full development of the talent" of the district's girls,[241] particularly in leadership, math and science skills.[242] A substantial amount of research exists on the benefits of single-sex education for girls.[243] Females who attend single-sex schools more frequently pursue nontraditional courses of study, have a better self-image, including greater confidence in their own abilities, perform at a higher level, especially in courses traditionally considered in the "male domain," and have more modern notions of sex roles.[244] Girls of junior-high age tend to suffer a tremendous decrease in self-esteem.[245] This can cause them to self-select out

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[238] *Id.* at 469 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975)).

[239] *Id.* at 470.

[240] *Id.* at 471-72. For criticism of the plurality's reasoning, see *infra* note 262 and accompanying text.

[241] *See VMI VI*, 116 S. Ct. 2264, 2276 (1996) (affirming that sex-based classifications may be used "to advance full development of the talent and capacities of our Nation's people").

[242] *See* Mollman, *supra* note 176, at 169 ("[A]n all-girls school designed to overcome gender discrimination by eliminating stereotypes and preparing students for nontraditional careers would be directly related to the statutory goal of redressing the effects of discrimination.").

[243] *See, e.g.*, MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 233 & n.29 (1994) (citing numerous studies and stating that "even as single-sex schools fight to survive, new studies offer a stunning message: Schools without boys seem to be good for girls."); Mollman, *supra* note 176, at 171-72.

[244] *See* GROSSMAN & GROSSMAN, *supra* note 8, at 143 (reporting the results of studies comparing girls at sectarian single-sex schools and girls in co-ed schools at both the high school and elementary level).

[245] *See* PIPHER, *supra* note 23, at 62-64 (attributing the decline in girls' confidence during adolescence both to social pressure and to the structural discrimination in the

of math, science and computer classes which can dramatically impact their futures.[246] A single-sex education for girls helps them combat this low self-esteem and "[a]fter years spent as first-class educational citizens, girls develop assertiveness, self-confidence, and leadership, skills that are typically acquired by the higher status gender."[247] Furthermore, math, science and computers are often perceived in co-educational schools as "masculine" topics.[248] Commentators have noted that single-sex education of these topics, on which YWLS focuses, can confer even greater benefits because presentation of these topics in such a setting can "help girls overcome stereotypical views of what is appropriate for them or what is within their abilities, enabling them to acquire skills in a manner not available to them in a mixed-sex group setting."[249] Evidence also reveals the success that women's colleges have in turning out women suited for leadership.[250] Graduates of women's colleges occupy a disproportionate number of prestigious and high-paying jobs in business, politics and professions requiring a scientific background.[251]

The Supreme Court may require not only a showing that single-sex education confers benefits on women, but also that "a single-sex format offers benefits *particular to that program*."[252] YWLS can meet this standard because scholarship suggests that girls can benefit more

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classroom); SADKER & SADKER, *supra* note 243, at 78 (reporting the results of a 1990 national survey demonstrating that girls' self-esteem fell dramatically between elementary and middle schools at an average of 31% while the average drop in self-esteem for boys was only 21%).

[246] *See* SADKER & SADKER, *supra* note 243, at 123-24 (reporting that girls' decisions to self-select out of classes like physics and chemistry may be partially attributable to their feelings that they do not understand the equipment as well as boys do); *cf.* Feldblum et al., *supra* note 209, at 181 ("The sex-role stereotypes learned by both girls and boys in their early years, and the resulting negative interactions that occur in mixed-sex settings later in life, mean that women are often unable to achieve their potential in mixed-sex settings and thus are prevented from achieving equality with men.").

[247] SADKER & SADKER, *supra* note 243, at 248.

[248] *See id.* at 122-24 (describing experiential data showing that both girls and boys conceive of scientists as men and that boys are more likely to dominate math, science and computer classes).

[249] Feldblum et al., *supra* note 209, at 177.

[250] *See* Willinger, *supra* note 201, at 255-56 (stating that "extensive research" supports the conclusion that single-sex education benefits many women).

[251] *See id.* at 256 (noting that 81% of women's college graduates continue their education beyond the undergraduate level).

[252] von Lohmann, *supra* note 209, at 210 (distinguishing between an institution's attempt to justify its single-sex education based on general findings about the benefits of single-sex education for women and an institution's justification that relies on evidence that women in one specific curriculum do better in a single-sex environment).

from leadership training and math and science instruction in a single-sex setting.[253] Moreover, minorities appear to reap special benefit from a single-sex learning environment.[254] These showings indicate that YWLS does not suffer from overinclusivity.[255] Overinclusive classifications have a greater propensity to reinforce harmful stereotypes.[256] In sum, excluding boys is substantially and directly related to the remedial objective.

If a court accepts the State's compensatory objective, then it does not matter if YWLS is unique or if its curriculum is offered elsewhere. To reiterate: no "evenhandedness" requirement exists for this objective because the theoretical focus of "compensation" rests on the idea that the classification levels the playing field—not that it confers a special benefit on one group at the expense of another.[257] This objective also lends itself to an additional argument for why boys might be denied the "special benefit" of single-sex education: all-male institutions further institutionalize sexism, thereby making the status of women in our society worse off—which undermines the State's compensatory objective.[258]

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[253] *See* Marlaine E. Lockheed & Katherine Patterson Hall, *Conceptualizing Sex as a Status Characteristic: Applications to Leadership Training Strategies*, 32 J. SOC. ISSUES 111, 120 (1976) (finding that women learn leadership skills better in single-sex rather than mixed-sex settings); M. Elizabeth Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385, 389-90 (1985) (reporting all-women colleges sent a greater percentage of women to medical school than did coeducational colleges).

[254] *See* Caplice, *supra* note 204, at 247-48 (citing studies showing that minority students attending single-sex schools perform better on tests and graduate at a higher rate than their peers at coeducational schools).

[255] *See* von Lohmann, *supra* note 209, at 211 (opining that a "compensatory self-defense course" for women is not overinclusive as the Ninth Circuit applied that standard to judge state-sponsored set-asides for female contractors); *see also* Weinberger v. Wiesenfeld, 420 U.S. 636, 652 n.19 (1975) (noting that "if the society's aim is to further a socially desirable purpose . . . it should tailor any subsidy directly to the end desired, not indirectly and unequally"); *cf.* Schlesinger v. Ballard, 419 U.S. 498, 507 (1975) (arguing that *Reed* and *Frontiero* showcased "overbroad generalizations that could not be tolerated under the Constitution").

[256] *See* von Lohmann, *supra* note 209, at 211. In addition to the previously mentioned factors, von Lohmann also argues that voluntary enrollment means that a program is "necessarily underinclusive." *Id.*

[257] Thus, Caplice's argument that "single-sex education [should] not [be] about putting one sex in a position to beat down or pull ahead of the other sex" rings hollow: by limiting single-sex education in this manner, women will not be ahead of men, but perhaps closer to level ground with them. *See* Caplice, *supra* note 204, at 287.

[258] *See, e.g.*, *VMI VI*, 116 S. Ct. 2264, 2277 n.8 (1996) ("'The pluralistic argument for preserving all-male colleges is uncomfortably similar to the pluralistic argument for preserving all-white colleges. . . . It is . . . likely to be a witting or unwitting device for

B. *The Potential Dangers of Compensatory Rationales Are Minimized Here*

As Justice Brennan warned in *Orr v. Orr*, compensatory justifications must be carefully scrutinized lest the classification reinforce invidious stereotypes about the class it purports to benefit.[259] The *Michael M.* case bore out Brennan's fears. Critics of *Michael M.* argue that California's purported purpose of pregnancy prevention "was a patently transparent post-hoc rationalization."[260] California's and other states' real rationales for their statutory rape laws include "cultural stereotypes about men as sexual aggressors, and women, especially young women, as passive and victimized, but never appropriately sexual agents."[261]

The reasoning in *Michael M.* illustrates how biology is used to disguise or justify social norms that keep women in traditional gender roles.[262] Although many commentators insist that pervasive and inherent differences distinguish, or polarize, the sexes,[263] it must be

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preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.'" (quoting JENCKS & REISMAN, *supra* note 177, at 297-98 (1968)); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-25, at 1066 (1978) ("[S]eparate educational facilities seem[] ... likely to contribute to a myth of male superiority in things academic ...."); Mollman, *supra* note 176, at 167 ("Rather than promoting equal opportunity, all-boys schools preserve male dominance."); Truely & Davis, *supra* note 5, at 735-36 (discussing a study that found that male teachers at all-boys private schools "perpetuated sexism by teaching male students to view women as sex objects and by socializing them to maintain power and control over women in sexual interactions"); *cf.* Feldblum et al., *supra* note 209, at 171 ("The restrictive membership policies of all-male organizations ... have often served to keep women out of positions of power and potential growth, and to perpetuate the view of women as a weak or inferior group.").

One YWLS student insightfully summed up the compensatory rationale: "'It's an idea of fairness that's been striven for. In order to go for that idea of fairness you may have to practice unfairnesses along the way.'" Henry, *supra* note 2, at 2D (quoting Deshana Hamid).

[259] *See* 440 U.S. 268, 283 (1979) (explaining that compensatory or protective objectives may shelter stereotypes about women).

[260] Finley, *supra* note 132, at 1095 (arguing that the Court has often based its decisions on essentialistic views about both men and women).

[261] *Id.*

[262] *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 11 (1995) (arguing that *Michael M.* is an example of a case where the Court relied "on the presumption that, on a fundamental level, males and females are not similarly situated—they are in fact different kinds of beings").

[263] *See* SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 2 (1993) (explaining that "gender polarization" is society's use of the idea that men and women are different to forge connections between sex and every aspect of human behavior, including "ways of expressing emotion and experi-

recognized that "[t]he variability among females and among males . . . far outweighs the average difference between males and females."[264] It is more sound to focus on the commonalities rather than the supposed differences between the sexes. By focusing on perceived differences between the sexes, it is easy to forget that society and socialization have created or magnified most of these so-called sex differences.[265] Thus, the *VMI* Court took the right approach when it refused to deny opportunities to women based on generalizations about their desires and abilities.[266]

District Four does not rely on biology to justify YWLS. The students at the school are not being compensated for their biology, but for societal discrimination. In analyzing compensatory classifications, courts must also question "whether a challenged program actually compensates women for discrimination, or is instead an exercise of 'romantic paternalism.'"[267] In the case of YWLS, the school's main goal is to overcome traditional notions about the proper roles of women.[268] Although it is possible that some onlookers will view the school as a manifestation of girls' inferiority in subjects like science and math, it seems more likely that the school will produce capable young women who are confident in their abilities and whose lives will be a testament to the invalidity of negative gender role stereotypes. The possible "double-edged" quality of benign classifications[269] cannot

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encing sexual desire"); *see also, e.g.*, Caplice, *supra* note 204, at 230 ("[B]oth sexes, because they develop physiologically, intellectually, and emotionally at different tempos, can benefit equally from single-sex instruction.").

[264] Avery, *supra* note 1, at 303 (emphasis omitted) (quoting the testimony of Professor Carol Nagy Jacklin, one of the government's expert witness in the second *VMI* trial).

[265] *See* Franke, *supra* note 262, at 40 (arguing that "gender norms, not precultural biological facts, make up the difference that sexual difference makes").

[266] *But cf.* Caplice, *supra* note 204, at 258 (arguing that "biological differences between the sexes transcend mere physical differences and extend to temperamental disposition and cognitive functioning").

[267] von Lohmann, *supra* note 209, at 212 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion), and noting that the effect of such paternalism puts women "'not on a pedestal, but in a cage'").

[268] *Cf. id.* (noting that "voluntary self-defense courses are inherently unlikely to reinforce traditional stereotypes"); Mollman, *supra* note 176, at 169 ("Rather than being based upon or perpetuating stereotypical views of women, these programs would prepare girls for nontraditional careers and lives.").

[269] *See* Udell, *supra* note 95, at 527 (discussing benign classifications as "double-edged . . . resting on stereotypes that ultimately precluded women from equal participation in society"); *see also* RHODE, *supra* note 219, at 298 ("Separatist education, like other separatist associations, offers the vices and virtues of a ghetto: it provides support, solidarity, and self-esteem for subordinate groups, but often at the price of per-

be forgotten, but this recognition should not preclude carefully tailored programs like YWLS from succeeding—it just means that courts must engage in careful scrutiny to guard against this defect. Careful scrutiny of YWLS suggests that it functions to overthrow stereotypes rather than perpetuate them and that it seeks "to create a society in which [its] compensatory function is no longer required."[270]

CONCLUSION

VMI implies that YWLS would be found constitutional. The foregoing analysis suggests that in the absence of a parallel school system, a single-sex school will only pass equal protection scrutiny if it is tailored to fit a compensatory purpose. Allowing for compensatory rationales, however, does not rely on any notion of biological difference, but rather, recognizes that society has treated and continues to treat women and men differently and that, sometimes, the government can try to ameliorate this disparate treatment. While YWLS fits this rationale, the more dominant trend of all-male schools probably would not withstand scrutiny, because men, unlike women, have not suffered historically from educational discrimination.[271]

Whether the "separate but equal" doctrine is appropriate in the area of sex discrimination remains an open question. It does appear that, if the Court adopts the doctrine in this area, other aspects of the Court's reasoning would constrain the doctrine's use.

This conclusion opens the door a crack to single-sex education. Most likely, only girls schools motivated by a remedial purpose and tailored to achieve that purpose will be able to slip through. Keeping in mind that the objective of these permissible classifications is to improve the status of women, courts must remain vigilant. They must not accept a benign classification at first glance, but must perform a searching analysis to determine whether the classification relies on fixed ideas about gender roles or uses essentialist ideas to cloak inequitable societal practices or assumptions.

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petuating attitudes that perpetuate subordination.").

[270] RHODE, *supra* note 219, at 299 (arguing that the positive aspects of single-sex environments like "role models, leadership opportunities, and positive teaching environments . . . should become more dominant in coeducational settings as well").

[271] *See* von Lohmann, *supra* note 209, at 213 (noting that men "are *generally* ineligible for special treatment under a remedial rationale"); *see also* Mollman, *supra* note 176, at 172-73 ("All-male public education inevitably perpetuates gender inequities, and thus violates the constitutional guarantees of equal opportunity embodied in the Fourteenth Amendment.").

The YWLS should pass such close scrutiny because rather than serving to perpetuate inequality, it aims to ensure girls "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[272]

[272] *VMI VI*, 116 S. Ct. 2264, 2275 (1996).